81-1623

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

Broadway State Office Building
P.O. Box 899
Jefferson City, Missouri 65102-0899
314-751-3321

Attorneys for Cross-Petitioners.

February, 1982

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Missouri may require by statute that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

2. Whether the State of Missouri may require by statute the attendance of a second physician, in addition to the primary surgeon, before an abortion of a viable fetus may be performed.

3. Whether the State of Missouri may require by statute that a tissue sample be taken of every abortion and submitted to a qualified pathologist for a pathology report.

4. Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. § 1988, should be proportioned to accurately reflect the extent to which a plaintiff prevails.

TABLE OF CONTENTS

Questions Presented for Review I

Table of Contents .....III, IV

Table of Authorities V

Cases V

Constitutional Provision V

Statutes .....V, VI

Official Reports of Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ:

I. The decision of the court below invalidating the Missouri requirement that abortions performed after twelve weeks of gestation be formed in a hospital is in conflict both with the applicable decision of this Court in *Roe* v. *Wade* and with decisions of other federal courts of appeal 11

II. The decision of the Eighth Circuit invalidating the Missouri requirement that pathology reports be prepared for all abortions conflicts with a decision out of the United States Court of Appeals for the Seventh Circuit 15

III. The decision of the Eighth Circuit, by invalidating the Missouri statutory requirement that a second physician be in attendance at the abortion of a viable fetus, has decided a federal question in a way so as to conflict with the applicable decision of this Court in *Roe* v. *Wade* 16

IV. The decision of the Eighth Circuit awarding attorneys' fees to plaintiffs without reference to the partial nature of their success conflicts with decisions of other federal courts of appeal 17

Conclusion 20

Appendix:

A. Opinion and Order entered January 23, 1980, United States District Court, Western District of Missouri, Central Division A-1

B. Interlocutory Opinion filed July 8, 1981, United States Court of Appeals, For the Eighth Circuit A-54

C. Judgment entered on November 30, 1981, United States Court of Appeals, For the Eighth Circuit A-113

TABLE OF AUTHORITIES

Cases

Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981) 12, 15

Batiste v. Furnco Construction Corporation, 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975) 19

Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 496 F.Supp. 894 (N.D.Ind. 1980), *aff'd sub nom.*, Gary-Northwest Indiana Women's Services, Inc. v. Orr, ____ U.S. ____, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981) 13, 15

Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980) 19

Hughes v. Repko, 578 F.2d 483 (3rd Cir. 1978) 19

Jones v. Diamond, 636 F.2d 1364 (8th Cir. 1981) 19

Morton v. Charles County Board of Education, 373 F.Supp. 394 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir. 1974) 19

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 18

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 625 (6th Cir. 1979) 19

Pearson v. Western Electric Installation Organization District Office, 542 F.2d 1150 (10th Cir. 1976) 19

Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 483 F.Supp. 679 (W.D.Mo. 1980) 1, A-1

Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), *final judgment*, 664 F.2d 687 (8th Cir. 1981) 1, A-54

Roe v. Wade, 410 U.S. 113, *reh. den.*, 410 U.S. 959 (1973) 11, 13, 14, 15, 16

Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) 19

Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979) 19

Wynn v. Scott, 449 F.Supp. 1302, 1322 (N.D.Ill. 1978), *appeal dismissed*, 439 U.S. 8 (1978), *aff'd*, 559 F.2d 193 (7th Cir. 1979) 15

Constitutional Provision

Fourteenth Amendment to the United States Constitution, Section 1 2

Statutes

§ 188.020, Missouri Revised Statutes 4, 9

§ 188.025, Missouri Revised Statutes 3, 4, 5, 9, 11

§ 188.028, Missouri Revised Statutes 4, 5, 9, 18

§ 188.030, Missouri Revised Statutes 4, 9, 16, 18

§ 188.030.3, Missouri Revised Statutes 3, 5, 7

§ 188.039, Missouri Revised Statutes 4, 9

§ 188.047, Missouri Revised Statutes 4, 5, 8, 9, 15

§ 188.052, Missouri Revised Statutes 4, 9

§ 188.063, Missouri Revised Statutes 5, 9

§ 188.075, Missouri Revised Statutes 5, 9

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343(3) 10

28 U.S.C. § 2101(c) 2

42 U.S.C. § 1983 10

42 U.S.C. § 1988 .....I, 2, 17

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OFFICIAL REPORTS OF OPINIONS BELOW

The primary decision of the United States District Court for the Western District of Missouri is reported at 483 F.Supp. 679 (W.D.Mo. 1980).

The interlocutory opinion of the United States Court of Appeals for the Eighth Circuit is reported at 655 F.2d 848 (8th Cir. 1981).

The opinion on remand of the District Court is unreported.

The supplemental opinion of the Eighth Circuit, making the judgment of the Court of Appeals final, is reported at 664 F.2d 687 (8th Cir. 1981).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was issued and filed on November 30, 1981. That final judgment incorporated specific findings and conclusions of a prior interlocutory judgment filed on July 8, 1981. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28 U.S.C. §§ 1254(1) and 2101(c). This cross-petition for certiorari does not depend upon the provisions of Supreme Court Rule 19.5 for purposes of timeliness, but is filed in full accordance with Supreme Court Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 U.S.C. § 1988:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect;

but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Missouri Revised Statutes, § 188.025:

"Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

Missouri Revised Statutes, § 188.030.3:

"An abortion of a viable unborn child shall be performed or induced only where there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this

section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

Missouri Revised Statutes, § 188.047:

"A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

STATEMENT OF THE CASE

On June 29, 1979, the Governor of the State of Missouri signed into law fifteen new sections of a comprehensive statutory scheme relating to the subject of abortion. On June 30, 1979, the plaintiffs filed their complaint in the United States District Court for the Western District of Missouri challenging, as unconstitutional, nine sections of the new law. The challenged sections of the legislation were: Section 188.020, providing that only licensed physicians may perform abortions; Section 188.025, providing that abortions after twelve weeks gestation must be performed in a hospital; Section 188.028, regulating abortion services for minors; Section 188.030, regulating abortions after viability of the unborn child; Section 188.039, providing for informed consent to abortion, including the requirement that certain facts be related by the attending physician to his abortion client; Section 188.047, requiring a pathology report after an abortion; Section 188.052, providing for the

collection and submission of abortion and complication reports for statistical purposes; Section 188.063, regulating abortion counseling; Section 188.075, providing a criminal penalty for violations of the Act. This cross-petition for certiorari is addressed to the invalidation by the United States Court of Appeals for the Eighth Circuit of the second trimester hospitalization requirement (Section 188.025); of the requirement that a second physician be in attendance at the abortion of a viable fetus (Section 188.030.3); of the requirement that a representative tissue sample be examined by a pathologist after each abortion (Section 188.047); and the approval by the Eighth Circuit of a District Court award of attorneys' fees and costs in the amount of $22,037.73.

The plaintiffs have already filed a petition for writ of certiorari challenging that portion of the judgment of the Eighth Circuit upholding Section 188.028 relating to parental or judicial consent respecting abortions performed on minors.

The Court of Appeals, affirming the District Court, found that the requirement of Section 188.025 that all second trimester abortions be performed in hospitals was unconstitutional. That conclusion was based upon the factual finding of the District Court that early second trimester abortions performed by the dilatation and evacuation method can be performed as safely in non-hospital settings (Appendix at 115-119). All experts, including those testifying on behalf of plaintiffs, agreed at the trial of this matter before the District Court that methods of second trimester abortion other than dilatation and evacuation, the installation of saline, prostaglandins, urea or combinations, thereof or hysterotomies, should in all cases be performed in hospitals. For the latest year in which statistics are available on a national basis, 1978, 49% or almost half of all second

trimester abortions were performed by methods other than dilatation and evacuation.

Further, abortion surveillance statistics maintained by the National Centers for Disease Control indicate that the risk of abortion to the health and well-being of a pregnant woman increase dramatically in proportion to the weeks of gestation, a view shared by all experts testifying. Upon remand of this case to the District Court, Dr. Willard Cates, the Chief of the Abortion Surveillance Branch of the Family Planning Evaluation Division of the National Centers for Disease Control, testified by deposition to his belief that abortions performed by means of dilatation and evacuation between the thirteen and fifteen weeks of pregnancy may be performed as safely in clinics as in hospitals. When Dr. Cates' deposition testimony is adjusted to account for the difference between last menstural period and conception for purposes of calculating trimeters, it becomes clear that abortions performed by dilatation and evacuation after the thirteenth week of pregnancy, as gestation is measured by Missouri law, should be performed in hospitals. Only one week of the second trimester, therefore, is recommended for D & E procedures outside of hospitals.

Combined with the unrebutted factual testimony that those 50% of second trimester abortions not performed by means of dilatation and evacuation absolutely mandate hospital procedures, the danger of even D&E procedures beyond the very early stages of the second trimester makes it clear that the Missouri requirement that all abortions performed after 12 weeks of gestation be performed in hospitals promotes maternal health. The plaintiffs attempted to prove that abortions performed during the early stages of the second trimester, in specific abortion clinics maintained by them, by means of dilatation and evacuation, were as safe as similar abortions performed in hospitals. The plaintiffs did not attempt to prove that abortions per-

formed by other methods could be done as safely in clinics as in hospitals, that D&E procedures could be performed as safely in clinics as in hospitals during the late stages of the second trimester, or that abortions performed in all clinics, in doctor offices, or at the home of the patient could be performed as safely as abortions performed in hospital settings. The record available to the District Court and to the Court of Appeals clearly established that Missouri's second trimester hospitalization requirement was reasonably related to the State's interest in promoting maternal health.

The Court of Appeals affirmed the District Court by invalidating the requirement that Section 188.030.3 requiring the attendance of a second physician during the abortion of a viable fetus. The Court held that this statutory section was overbroad because it would require the attendance of a second physician on those occasions when a D&E procedure was performed on a viable fetus, even though in such case there is no chance of fetal survival (Appendix at 82-84). The evidence available before the District Court and the Court of Appeals was overwhelming that D&E is not the procedure of choice after viability. The only evidence presented at trial that D&E could be the procedure of choice after viability was given by Dr. Robert Crist, an expert retained by the plaintiffs. Dr. Crist also testified that he believes his female patients have the right not only to be rid of an unwanted pregnancy, but to a dead fetus as well (Tr. 431), and that he never attempts to save the fetus in abortion cases (Tr. 431, 435). What more convincing proof of the need for a second physician could be offered? All other experts who testified during the trial of this case were unanimous in their belief that dilatation and evacuation procedures should not be used during the latter stages of the second trimester where a chance of a viable fetus existed. The invalidation of this statutory section by the District Court, as affirmed by the Court of Appeals,

relies solely on the conclusion that a second physician would not be needed during an dilatation and evacuation procedure performed after viability because there was no chance of fetal survival. The improper medical practice of one isolated doctor should not used as an excuse for invalidating a section of state law which attempts to promote and protect human life. A viable fetus is a child which, given a fair chance by the presence of a doctor whose sole purpose it is to protect that child, may live.

The Court of Appeals invalidated Section 188.047, requiring pathology reports with respect to tissue samples taken at the time of all abortions. The Court of Appeals framed the issue thusly:

> "The issue here is not whether pathology reports are useful and even necessary in some cases. They clearly are. Testimony indicated that abormalities in the tissue may warn of serious, possibly fatal disorders. Instead, the question here is whether Missouri has shown any reason why the physicians and medical facilities performing abortions cannot make medical judgments about the desirability of a pathology report in an individual case, while physicians and medical facilities performing all other types of surgery are free to exercise their professional judgment." (Appendix at 95)

As testimony at trial established, only through a pathological examination is there any assurance, independent of the attending physician's own unschooled judgment, that the women upon whom the procedure was performed was in fact pregnant, and if so, that the pregnancy was in fact terminated completely. The additional benefits to the woman are the opportunity for a trained pathologist to discover the presence of a molar pregnancy, a hydatitaforme mole or other precancerous growths, and a variety of other prob-

lems which can only be discovered through a pathological examination. That the State of Missouri's interest in the maintenance of good medical standards and in maternal health are served by this requirement is clear. The singling out of abortions for pathological reports is rational. Other surgical procedures are almost always performed in hospitals where pathological studies are taken as a matter of course. On the other hand, the vast majority of abortions are performed in clinics which will not, absent a clear statutory requirement that they do so, routinely increase their costs or complicate their normal assembly line procedures by taking the time necessary to protect the health of their surgical patients. The Court of Appeals accepted as true the State's testimony that examinations of fetal tissue by pathologists was good medical practice.

The Court of Appeals affirmed the award, by the District Court, of $22,037.73 in attorneys' fees and costs, including specifically $19,279.00 in attorneys' fees (Appendix at 98-99). Plaintiffs originally identified nine sections of the Missouri statutory scheme for challenge in their complaint. They subsequently did not pursue their challenge to Section 188.075. Of the remaining eight sections which were actively challenged at trial, the District Court declared Sections 188.025, 188.028, 188.030 and 188.063 to be unconstitutional in their entirety. The District Court also found that portions of Section 188.039 were unconstitutional upholding the remainder. Sections 188.020, 188.047 and 188.052 were upheld as written. Subsequently, the Eighth Circuit on appeal reversed the District Court with respect to Section 188.028 and two out of the three sections of Section 188.030, effectively finding for the defendants in those instances. The Court of Appeals did give the plaintiffs an additional minor victory by reversing the Court of Appeals with respect to the constitutionality of Section 188.047. Nevertheless, the Eighth Circuit did not reduce the award

of attorneys' fees to reflect plaintiffs' partial success even though it was aware, on the record, that the District Court had allowed every hour claimed by the attorneys for plaintiffs.

The basis for federal jurisdiction in the District Court was Title 28 U.S.C. § 1343(3) and Title 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below invalidating the Missouri requirement that abortions performed after twelve weeks of gestation be performed in a hospital is in conflict both with the applicable decision of this Court in Roe v. Wade and with decisions of other federal courts of appeal.

The United States Court of Appeals for the Eighth Circuit, affirming the United States District Court for the Western District of Missouri, invalidated Missouri statute Section 188.025 requiring that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital. In so doing, the Eighth Circuit acted in direct contradition to the clear and controlling mandate of this Court as stated in *Roe* v. *Wade*, 410 U.S. 113, at 163-164, *reh. den.*, 410 U.S. 959 (1973).

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. *Examples of permissible state regulation in this area are requirements* as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; *as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status;* as to the licensing of the facility; and the like.
>
> . . . .

To summarize and to repeat:

. . . .

. . . For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interests in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." (Emphasis added)

Clearly, in the face of such clearly stated and applicable precedent, the court below erred by invalidating the Missouri statutory requirement that abortions performed after the first trimester of pregnancy be performed in hospitals.

The decision of the Eighth Circuit also conflicts with the decision of at least one other federal court of appeal on this precise issue. In *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 651 F.2d 1198 (6th Cir. 1981), the same general categories of evidence were offered by the plaintiffs in support of their attempt to invalidate a second trimester hospitalization requirement in the City of Akron. The plaintiffs, as in the present case, presented proof purporting to show (1) that dilatation and evacuation abortion procedures, performed early in the second trimester, were safer than birth and could be safely performed outside of hospitals, and (2) that the requirement that such procedures be performed in hospitals burdened the decision of the woman to abort because hospitalization was more expensive than clinic procedures, and because dilatation and evacuation procedures were not readily available in the hospitals operating within the City of Akron. The evidence proffered by plaintiffs in the present instance was almost identical. Nevertheless, the Sixth Circuit affirmed a district court holding that the Akron city ordinance requiring hospitalization after the first trimester was constitutional. 651 F.2d at 1210.

In reaching its decision directly in conflict with that reached by the Eighth Circuit, the United States Court of Appeals for the Sixth Circuit relied strongly on *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F.Supp. 894 (N.D.Ind. 1980), *aff'd sub nom., Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, ____ U.S. ____, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981). In *Gary-Northwest*, a three-judge district court was confronted with proof similar to that offered by plaintiffs in the present case concerning the safety of dilatation and evacuation procedures during the early stages of the second trimester and the extra cost of hospitalization. With respect to the extra cost of hospitalization and the burden that cost would place upon pregnant women, the United States District Court for the Northern District of Indiana stated that:

> "The combination of the hospitalization requirement and the pregnant women's indigency does not render unconstitutional this pursuit of Indiana's legitimate, compelling, interest in protecting maternal health. The obstacle which the women face is not the hospitalization requirement, but the women's indigency. . . ." 496 F.Supp. at 901.

With respect to the safety of performing dilatation and evacuation procedures in the early stages of the second trimester, that district court stated as follows:

> "It would be impractical for the constitutionality of a second trimester regulation to depend on a factual question, such as whether the regulation in fact reduced maternal morbidity and mortality. Interpreting *Roe* to require that second trimester regulations except specific types of abortions which may be safer than childbirth would require relitigation of the regulation's constitutionality with each change in the availability of abortions, with each improvement in abortions, with each improvement in abortion technique,

and with each publication of statistics showing that abortion skills had improved. Such as interpretation of *Roe* would result in repeated relitigation of the constitutionality of the same statute. It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation. *Roe* should not be given an interpretation which results in repeated relitigation of a statute's constitutionality. *Roe* does not render the constitutionality of second trimester regulations subject to either the availability of abortions or the improvements in medical techniques and skills.

The test for determining the constitutionality of statutes regulating second trimester abortions is not whether the statute has the statistically demonstrable result of decreasing maternal morbidity or mortality for specific groups of abortions. Whether, as a matter of fact, it is statistically demonstrable that the regulation results in decreased maternal morbidity and mortality is a matter to be considered, but it is not the ultimate test. The ultimate test is a broader test: whether the legislature acted reasonably in determining that the regulation would promote maternal health. Furthermore, the statistics used to determine the reasonableness of a regulation would have to be the statistics not for a specific group of abortions, but for all the abortions to which the regulation applies. A statutory regulation of second trimester abortions is constitutional if it was reasonable for the state to conclude that the regulation would promote maternal health.

It was reasonable for Indiana to conclude that the second trimester hospitalization requirement would promote maternal health." 496 F.Supp. at 901.902.

This Honorable Court affirmed without opinion the judgment of the three-judge district court in the *Gary-*

Northwest Indiana case. As the Sixth Circuit held in upholding a second trimester hospitalization requirement:

> "Many of the same arguments for holding the requirement that all second trimester abortions be performed in a hospital unconstitutional which were made in the present case were made by the plaintiffs in *Gary-Northwest*. Though the evidence on this issue in the present case was more detailed than that produced in *Gary-Northwest*, the thrust of the plaintiffs' proof and arguments was the same. The Supreme Court has now had an opportunity to retreat from the 'bright line' drawn in *Roe* v. *Wade* and has declined to do so. . . ." *Akron Center for Reproductive Health, Inc.* v. *City of Akron, supra at* 1210.

II.

The decision of the Eighth Circuit invalidating the Missouri requirement that pathology reports be prepared for all abortions conflicts with a decision out of the United States Court of Appeals for the Seventh Circuit.

The Eighth Circuit, in reversing the District Court, invalidated Section 188.047 of the Revised Statutes of Missouri, requiring a representative sample of tissue removed at the time of each abortion to be submitted to a pathologist for a report, on the basis that the requirement increased the cost of the abortion, thereby burdening the women's decision to abort, and because Missouri has not required by statute pathology reports following other medical procedures (Appendix at 92-97).

The court in *Wynn* v. *Scott*, 449 F.Supp. 1302, 1322 (N.D.Ill. 1978), *appeal dismissed*, 439 U.S. 8 (1978), *aff'd*, 559 F.2d 193 (7th Cir. 1979), was confronted with a substantially identical Illinois statute. That court reached the opposite result from the Eighth Circuit and upheld the

statutory section. The cross-petitioners submit (1) that there is a conflict among the federal courts, and (2) that this specific Missouri statute, as acknowledged by the lower court (Appendix at 94), is rationally related to the State's legitimate interest in preserving maternal health.

III.

The decision of the Eighth Circuit, by invalidating the Missouri statutory requirement that a second physician be in attendance at the abortion of a viable fetus, has decided a federal question in a way so as to conflict with the applicable decision of this Court in Roe **v.** Wade.

Section 188.030, Revised Statutes of Missouri, requires that a second physician be in attendance, for the purpose of preserving the life and health of the aborted infant, when an abortion is performed on a viable fetus. The Eighth Circuit found that requirement unconstitutional. (Appendix at 84). The lower court found the section overbroad as the result of its factual conclusion that no child could survive a dilatation and evacuation abortion procedure making the attendance of a second physician to protect the health of such child unnecessary. This factual finding was made despite an overwhelming factual record developed in the District Court, supported by experts who testified for both plaintiffs and defendants, that dilatation and evacuation should never be the procedure of choice at a sufficiently late date in the pregnancy that the fetus would be viable. In effect, the lower court was condoning not only bad medical practice but murder by some physicians.

We quote from *Roe* v. *Wade,* 410 U.S. 113, 163-164 (1973):

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaninful life outside

the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

Obviously, if the State's interest in potential human life after viability is so compelling as to allow it to proscribe abortion, then that interest is sufficiently compelling, under controlling Supreme Court precedent, to allow the state to require the attendance of a second physician to preserve and care for that potential human life.

IV.

The decision of the Eighth Circuit awarding attorneys' fees to plaintiffs without reference to the partial nature of their success conflicts with decisions of other federal courts of appeal.

In addressing the contention of the cross-petitioners that plaintiffs did not prevail on every issue and that attorneys' fees should be proportioned to reflect the extent to which they did prevail, the Eighth Circuit reached the following conclusion:

"The result obtained is only one factor to be considered, and it is not necessarily an abuse of discretion for the district court to award attorneys' fees based on all the work performed and not just on the claims on which the plaintiffs were successful. '[A]ttorney's fees awarded under Section 1988 should not be limited to hours expended on those issues to which the plaintiff was successful.' *Crain* v. *City of Mountain Home*, 611 F.2d at 729 n.7. *See also Johnson* v. *Nordstrom-Larpenteur Agency*, 623 F.2d 1279, 1282 (8th Cir.), *cert. denied*, ____ U.S. ____, 101 S.Ct. 622, 66 L.Ed.2d 504

(1980); *Brown* v. *Bathke*, 588 F.2d 634, 637 (8th Cir. 1978)." Appendix at 98-99.

Of the eight sections challenged by plaintiffs at the trial of this case, four were found by the District Court to be unconstitutional and one other was partially invalidated. Three of the sections were upheld by the District Court as written. Nevertheless, the appellate court approved the award of attorneys' fees by the District Court of all hours claimed by the attorneys for the plaintiffs before the District Court. The Eighth Circuit did this even though their opinion on appeal further restricted the extent to which the plaintiffs succeeded in their lawsuit. For example, the District Court was reversed on the constitutionality of Section 188.028, relating to consent for minors, holding in effect for the defendants on perhaps the most important of all the statutory sections challenged in the lawsuit, and the only failure which has prompted plaintiffs to seek review by certiorari. The appellate court also reversed the District Court on two-thirds of Section 188.030, relating to abortion of viable fetus, again one of the more important of the statutory sections attacked on the case. On the other hand, the plaintiffs were successful before the Eighth Circuit in having the District Court's approval of the pathology report section reversed. The cross-petitioners submit that this section, although important, does not represent as great an impact in the area of abortion as did those sections won by defendants on appeal.

The cross-petitioners reiterate that the Eighth Circuit affirmed the award by the District Court of attorneys' fees for every single hour claimed by the attorneys for the plaintiffs during the trial of this lawsuit before the District Court.

The opinion of the Eighth Circuit regarding attorneys' fees is in direct conflict with the positions of the First Circuit, *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir.

1978), the Third Circuit, *Hughes* v. *Repko*, 578 F.2d 483 (3rd Cir. 1978), the Fourth Circuit, *Morton* v. *Charles County Board of Education*, 373 F.Supp. 394, 411 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir. 1974), the Seventh Circuit, *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), the Ninth Circuit, *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972), and *Sethy* v. *Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979), and the Tenth Circuit, *Pearson* v. *Western Electric Installation Organization District Office*, 542 F.2d 1150 (10th Cir. 1976) and *Gurule* v. *Wilson*, 635 F.2d 782, 794 (10th Cir. 1980) (A complete review of Tenth Circuit precedent in this issue, and especially the confusing statements made in *Gurule*, does make the position of that Court of Appeals somewhat ambiguous.[1]

These conflicts between the actions taken by the Eighth Circuit and the District Court in this case and the positions maintained by the majority of the Circuit Courts of Appeals justify the grant of certiorari to review this judgment.

---

[1] Apparently in accord with the position taken by the Eighth Circuit are the Fifth Circuit, *Jones* v. *Diamond*, 636 F.2d 1364 (8th Cir. 1981) and the Sixth Circuit, *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 625, 635 (6th Cir. 1979). The cross-petitioners found no relevant precedent from the District of Columbia and Second Circuits.

CONCLUSION

For the foregoing reasons, cross-petitioners request this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

Broadway State Office Building
P.O. Box 899
Jefferson City, Missouri 65102-0899
314-751-3321

Attorneys for Cross-Petitioners.

February, 1982

APPENDICES

APPENDIX A

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., et al., Plaintiffs,

v.

John ASHCROFT et al., Defendants.

No. 79 4142 CV C.

United States District Court, W. D. Missouri, C. D.

Jan. 23, 1980.

OPINION AND ORDER

ELMO M. HUNTER, District Judge:

This is an action for declaratory and injunctive relief in which plaintiffs challenge the constitutionality of several sections of the 1979 Missouri act relating to the regulation of abortions ("the Act").[1] This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

Plaintiffs are Planned Parenthood Association of Kansas City, Missouri, Inc., and Reproductive Health Services, not-for-proft Missouri corporations. Plaintiffs maintain and operate out-patient clinics in Kansas City and St. Louis, Missouri, respectively, at which medical services are offered to the public, including first trimester abortions performed by staff physicians and pregnancy-related counseling.

---

[1] House Committee Substitute for House Bill Nos. 523, 626 and 902, 80th Gen. Ass'y, 1st Reg.Sess. (1979). The full text of the Act is set out in the Appendix.

Plaintiff physicians are Allen S. Palmer, D. O., and Naim S. Kassar, M. D. Dr. Palmer is licensed to practice medicine in the State of Missouri and performs first trimester abortions on an out-patient basis, both at the Reproductive Health Services clinic and as part of his private medical practice. Dr. Palmer does not perform abortions after the first trimester of pregnancy, but would do so absent the statutory requirement that post-twelve week abortions be performed only in a hospital. Dr. Kassar is also licensed to practice medicine in the State of Missouri. As a part of his medical practice, Dr. Kassar performs first trimester abortions on an out-patient basis in the Planned Parenthood clinic and in a hospital setting. Dr. Kassar performs post-first trimester abortions in a hospital setting, but under certain conditions, would perform such abortions in an out-patient clinic, absent the statutory requirement that post-twelve week abortions be performed only in a hospital.

Defendants are the Honorable John Ashcroft, Attorney General of the State of Missouri, and Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri, who is sued both in that capacity and "as representative of the class of all similar Prosecuting Attorneys of the various counties of the State of Missouri."

The Act was passed by the General Assembly of the State of Missouri on June 15, 1979, and signed into law by the Governor on June 29, 1979. An emergency clause caused the Act to be effective immediately upon the Governor's approval.[2] This action was filed on June 30, 1979, and after a hearing, the Court temporarily restrained enforcement of §§ 188.020, .025, .030, .039, .040, .052, .063, and .075, RSMo, as signed into law on June 29, 1979. Defendants consented to renewal and extension of that order

---

[2] *Ibid.*, § A.

pending a determination on the merits. Upon defendants' motion and to maintain the status quo, the temporary restraining order was modified on September 27, 1979, to delete §§ 188.020, .025, and .075, RSMo, from its effect. Full trial on the merits was had on October 15-20, 1979.

I.

Standing

[1] Plaintiff physicians have standing to challenge the constitutionality of the sections at issue in this case. *Singleton* v. *Wulff*, 428 U.S. 106, 98 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Defendants concede that the corporate plaintiffs have standing to challenge § 188.025, the requirement that post-twelve week abortions be performed only in a hospital, and § 188.063, which regulates abortion counseling in "abortion facilities," but assert that the organizations lack standing to litigate the constitutionality of any other of the Act's provisions. In light of the standing of plaintiff physicians, the Court need not reach the issue of the corporate plaintiffs' standing.[3]

---

[3] Defendants contend that, excepting §§ 188.025 and 188.063, the Act imposes no obligation or regulation on clinics which offer abortion services but rather is directed at the regulation of physicians who perform abortions. *But see Womens Services, P.C.* v. *Thone*, 483 F.Supp. 1022 (D.Neb.1979) (abortion clinic has standing based on theory of accessory liability under abortion regulation's criminal sanctions); *Akron Center of Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172 (N.D.Ohio 1979); *Baird* v. *Bellotti*, 393 F.Supp. 847 (D.Mass. 1975), *vacated and remanded on other grounds*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). *See also* § 188.075 RSMo ("Any person who contrary to the provisions of [the Act] knowingly . . . aids in the performance of any abortion . . . shall be guilty of a class A misdemeanor. . . ."); § 562.041, RSMo (general criminal accessory liability statute); § 562.056, RSMo (corporate liability statute).

II.

Abortions to be Performed Only by a Physician

Section 188.020 provides: "No person shall perform or induce an abortion except a physician." Plaintiffs' challenge to this restriction is that it prevents a pregnant woman from inducing or performing an abortion on herself. The constitutional infirmity, argue plaintiffs, is two-fold: (1) the statute violates the pregnant woman's constitutional right to "self-treatment," and (2) the Act's penalty provision[4] mandates accessory criminal liability for the physician who, by prescribing an abortion-inducing medication or other abortifacient for a pregnant woman, would aid or abet a non-physician (the pregnant woman herself) to perform or induce an abortion in violation of § 188.020.[5]

---

[4] § 188.075, RSMo.

[5] Plaintiffs' medical experts testified of their use of the so-called "morning-after pill," high dosage estrogen prescibed within 48-72 hours following intercourse. The effect of the morning-after pill is to prevent nidation (implantation of the fertilized ovum in the uterine wall). Because the morning-after pill works *after* conception, it is an abortifacient. Plaintiff physicians testified that although the doctor prescribes and provides the abortifacient medication, it is the pregnant woman who decides whether to take the drug and who administers the medication to herself. In such a situation, say plaintiffs, the doctor assists the pregnant woman to abort herself. Plaintiffs suggest that the same reasoning also applies to use of the intrauterine device (IUD); that the doctor's insertion of an IUD aids the woman in aborting herself should conception occur. There was also testimony regarding the development of a new abortifacient in the form of a tampon impregnated with prostaglandins, which could be inserted by the woman and have the effect of self-induced abortion. There was no evidence, however, that this abortifacient is presently available.

Defendants argue that because the morning-after pill and, "in nearly all cases," the IUD work prior to development of the embryo, neither constitutes an abortion within the meaning of the Act. However, the

(Continued on next page)

Plaintiffs do not argue that the legislature intended to include the pregnant woman herself within the limitation imposed by the statute but submit that that "plain wording" of the section does so. Accordingly, the prayed-for relief is "merely . . . a declaration that this Section may not constitutionally apply to women seeking to self-abort or to physicians who assist them in doing so."

The context of the present case makes a determination of the constitutional questions posed by plaintiffs unnecessary. The regulation against abortions performed by nonphysicians has been in effect in the State of Missouri, with substantially similar language, since June 14, 1974.[6] This Court is unaware of any case in which the prohibition on abortion by nonphysicians was ever applied to the pregnant woman herself. The Court has been directed to no decision of the courts of the State of Missouri which interprets the provision in that way. There is nothing in the extensive record in this case which would indicate that the legislature intended to criminalize an act of self-abortion by the pregnant woman herself.[7]

Footnote continued

Act defines "abortion" as "the intentional destruction of the life of an ambryo or fetus in his or her mother's womb *or* the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child." § 188.015.1, RSMo (emphasis added).

[6] Section 188.020(1), RSMo (Supp. 1979) repealed June 29, 1979; § 188.020 of the 1979 Act was enacted in lieu thereof) provided: "No abortion shall be performed . . . except: (1) By a duly licensed, consenting physician. . . ."

[7] Section 188.080, RSMo, provides:

> Any person who is not a licensed physician as defined in section 188.015 who performs or attempts to perform an abortion *on another* as defined in subdivision (1) of section 188.015, is guilty of a felony. . . . (emphasis added)

This section was enacted as a part of the 1974 act relating to abortion and remained in effect at the time of enactment of the 1979 Act.

[2, 3] This Court is obliged to give the regulation that reasonable interpretation which avoids a danger of constitutional invalidity. *United States* v. *Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *State* v. *Metropolitan St. Louis Sewer District*, 365 Mo. 1, 275 S.W.2d 225 (En banc 1955). That reading of the section's prohibition of abortions performed by nonphysicians which would include the pregnant woman herself within its ban raises such a serious constitutional question. Accordingly, it is not adopted by the Court. As applied to a non-physician performing an abortion *on another person*, the statute is not challenged here and is clearly valid. *Connecticut* v. *Menillo*, 423 U.S. 9, 96 S.Ct. 170, 46 L.Ed.2d 152 (1975).

III.

Post-Twelve Week Abortions to be Performed Only in a Hospital

[4] Section 188.025 provides that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital. Both physician plaintiffs testified that, absent statutory prohibition, they would perform post-twelve weeks abortions in an out-patient clinic. Plaintiff's argue that the in-hospital requirement places an undue burden on the abortion decision and on the means of effectuating that decision. Plaintiffs also contend that the requirement does not constitute a reasonable regulation in the interests of maternal health.

In *Roe* v. *Wade*, 410 U.S. 113, 163, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973), the Supreme Court held that "from and after [approximately the end of the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." An example of a permissible subject of regulation was "the facility in which the procedure is to be performed, that is, whether it must

be a hospital or may be a clinic or some other place of less-than-hospital status." In *Doe* v. *Bolton*, 410 U.S. 179, 195, 93 S.Ct. 739, 749, 35 L.Ed.2d 201 (1973), the Court struck down a requirement that all abortions be performed in an accredited hospital but reserved the authority of a state to adopt such a regulation after the first trimester "so long as those standards legitimately related to the objective the State seeks to accomplish."

In *Wynn* v. *Scott*, 449 F.Supp. 1302 (N.D.Ill.), *appeal dismissed sub nom. Carey* v. *Wynn*, 439 U.S. 8, 99 S.Ct. 49, 58 L.Ed.2d 7 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979), the district court noted that the Supreme Court "specifically stated" that the state may require post-first trimester abortions be performed only in hospitals. The court upheld as rationally related to maternal health a regulation which required post-first trimester abortions be performed on an in-patient basis in a hospital equipped with life-support equipment for the fetus if there is any "clearly visible evidence" of viability. In that case, the court noted, 449 F.Supp. at 1318:

> The methods of performing abortions after the first trimester are relatively complicated. Injection of saline or prostaglandins into the amniotic sac, and hysterotomies take time and require controlled conditions.

Plaintiffs urge that the record before this Court is significantly different from that before the district court in *Wynn;* that the advancement of medical knowledge renders the reasoning of *Wynn* inapplicable.

The controversy over Missouri's in-hospital requirement centers on the abortion technique known as dilatation and evacuation (D & E).[8] This post-first trimester abor-

[8] Plaintiffs concede that post-first trimester abortion techniques other than D & E, including saline instillation, prostaglandins, hysterotomy and hysterectomy, should be performed only in a hospital.

tion technique was relatively unknown at the time of the 1973 Supreme Court decisions in *Roe* and *Doe* but has come to be a common procedure for the termination of pregnancies of longer than twelve weeks gestation.[9] Plaintiff physicians state that D & E is currently the safest post-first trimester abortion technique up to eighteen weeks gestation and that absent the statutory prohibition they would perform post-first trimester abortions using the D & E method in clinics on an out-patient basis. Plaintiffs' medical experts testified that, consistent with good medical practice, post-first trimester abortions can be done safely in an out-patient clinic, at least up to eighteen weeks gestation. Defendants' experts testified that all post-first trimester abortions, regardless of technique employed, should be performed in a hospital because of the increasing risk accompanying later abortions and the ability of a hospital to better deal with potential complications.[10]

In *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court held that a Missouri statutory prohibition on the use of saline

---

[9] In 1977, 73.3% of reported abortions at 13-15 weeks gestation were done by D & E. Of all reported post-12 week abortions, 38.6% were done by D & E. Utilization of other methods for post-12 week abortions in 1977 was as follows: saline instillation, 38.3%; prostaglandins, 16.5%; hysterotomy, 0.4%; hysterectomy, 0.5%; other and unknown, 5.6%. Center for Disease Control, U.S. Dep't of H.E.W. *Abortion Surveillance 1977*, Table 18.

[10] Defendants' experts testified that a hospital would be equipped with life support systems, an intensive care unit, and a blood bank, and would have the services of an expert anesthesiologist, all of which would be unavailable at a free-standing out-patient clinic. Plaintiffs argue that the emergency room resources of nearby hospitals would be available in case of complications resulting from abortions performed at out-patient clinics.

instillation as a post-twelve abortion technique failed as a reasonable regulation for the protection of maternal health.

> The State, . . . would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth. Moreover, as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed.

Id., at 78-79, 96 S.Ct. at 2845. The court found that the *existence* of prostaglandins instillation, an alternative technique actually safer than saline, did not justify the ban on saline. The prostaglandins alternative was at that time limited to experimental use and, as a practical matter, was unavailable in the State of Missouri.[11] The prohibition of the saline technique was therefore "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vest majority of abortions after the first twelve weeks." *Id.*, at 79, 96 S.Ct. at 2845.

On the record before it, this Court is convinced that aside from the question whether it is performed in a hospital or in an out-patient clinic,[12] dilatation and evacuation is the safest of the presently available post-twelve week

---

[11] "Such an experimental and limited use of prostaglandin throughout the country does not make it available or accessible to concerned persons in Missouri." *Planned Parenthood* v. *Danforth, supra*, at 77 n.12, 96 S.Ct. at 2845.

[12] Dr. Bernard Nathanson, one of defendants' experts, testified that the morality and morbidity rates for D & E procedures performed outside a hospital were probably no different than those performed in a hospital.

abortion techniques.[13] However, the record also indicates that post-twelve week D & E procedures are performed at only one hospital in the State of Missouri.[14] Thus, the requirement that all post-twelve week abortions be performed in a hospital has the practical effect of making a D & E procedure, the safest post-twelve week technique, an alternative which is simply unavailable to many pregnant women in Missouri. Under the reasoning of the Supreme Court in *Danforth*, the state's limitation of post-twelve week abortions to hospitals cannot stand as a reasonable regulation for the protection of maternal health. The effect of the regulation is to make unavailable the most commonly utilized and the safest post-twelve week abortion technique. As a practical matter, it may force a woman and her doctor to terminate her pregnancy by a method made unavailable. The limited availability of the D & E procedure in a single hospital on the western boundary of the state does not convince the Court that D & E is an accessible or meaningful alternative to large numbers of pregnant women in Missouri, particularly those in rural areas or in the metropolitan St. Louis area on Missouri's eastern border. *See Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 77 n. 12, 96 S.Ct. 2831.

---

[13] Mortality rates (per 100,000 cases) for post-12 week abortion techniques for the years 1972-1977 are as follows:

D & E	8.3
Prostaglandins and other agents	10.8
Saline instillation	15.5
Hysterotomy and hysterectomy	45.3

Center for Disease Control, U.S. Dep't of H.E.W., *Abortion Surveillance 1977*, Table 23.

[14] The uncontroverted testimony of Dr. Naim Kassar was that the Truman Medical Center in Kansas City is the only hospital in the State of Missouri which permits post-12 week abortions by D & E. *cf. Poelker* v. *Doe*, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977) (a state or city may constitutionally close public hospitals to *all* non-therapeutic abortions).

Missouri's in-hospital requirement for all post-twelve week abortions fails for another reason. In *Planned Parenthood* v. *Danforth*, the Supreme Court held that the state may not grant a third party, in that case the parents of an unmarried woman under the age of eighteen, an absolute veto over the decision of the physician and his patient to terminate the patient's pregnancy. 428 U.S. at 74-75, 96 S.Ct. 2831. *See also Bellotti* v. *Baird (Bellotti II)*, 443 U.S. 622, 639, 99 S.Ct. 3035, 3046, 61 L.Ed.2d 797, 818 (1979). The record before this Court indicates that there is no hospital in the State of Missouri which will admit a woman under the age of eighteen without parental consent.[15] The statute's effect is to impose an absolute parental consent requirement for women under the age of eighteen who desire to terminate pregnancies of longer than twelve weeks gestation. The in-hospital requirement gives the parents of a woman under eighteen who desires a post-twelve week abortion the "absolute, and possibly arbitrary, veto" outlawed by the Supreme Court in *Danforth* and therefore cannot stand.[16]

---

[15] Uncontroverted testimony of Drs. Allen Palmer, Naim Kassar, and Robert Crist. There was evidence that a high proportion of women desiring post-12 week abortions are in the younger age group. Reasons for delay in seeking an abortion by women under 18 include a lack of sophistication, psychological denial by the younger woman of knowledge and the means to seek an earlier abortion.

[16] It may be argued that this infirmity is avoided by the provision in § 188.028 for judicial consent or judicially-granted self-consent to an abortion for a woman under 18. Even if that procedure was constitutionally valid, *see* Part IV, *infra*, it does not provide for judicial consent to hospitalization of a woman under 18 or that Missouri hospitals must alter their admissions policies to accept either judicial consent or judicially-granted self-consent and admit women under 18 without parental consent.

Plaintiffs additionally argued: (1) that the increased cost, longer time required, and loss of anonymity associated with an in-hospital post-12 week abortion constitutes an undue burden on the effectua-

(Continued on next page)

IV.

Consent for Minors

[5] Section 188.028 provides a special procedure to obtain or provide consent for an abortion in the case of a pregnant woman as under the age of eighteen. Unless a minor is "emancipated," in order for her to obtain an abortion she must secure the consent of one parent or guardian, she must have been granted by court order the right to self-consent, or she must have been granted judicial consent to the abortion. The statute sets out a procedure whereby the minor may seek either the right to self-consent or judicial consent. It provides for the filing of an application in the juvenile court by the minor or her next friend and specifies necessary allegations, including the initials of the minor and the names and addresses of her parents, guardian, or person standing in loco parentis. The minor's parents, guardian or person standing in loco parentis are then to be served with copies of the petition and notice of the time and place of the hearing on the minor's application. There is provision for constructive notice by certified mail if service is not had within two days. The Court may appoint a guardian ad litem for the minor if a conflict of interests appears between the child and her parents or guardian. There is provision for the appointment of counsel, in appropriate circumstances, for "any party."

A hearing is to be held within five days of the filing of the petition, at which the court is to hear evidence re-

---

Footnote continued

tion of a pregnant woman's abortion decision; and (2) that the in-hospital requirement is actually contrary to the promotion of maternal health due to an increased risk of infection and the prevalent use of general anesthetics in most hospitals. In light of the above, it is not necessary to reach these arguments.

lating to whether the minor should be granted the right to self-consent to an abortion or whether the abortion is in her best interest. The court is then to issue a decree in which it shall, for good cause, take one of the following actions: (1) grant the minor the right to self-consent; (2) find the abortion to be in the best interests of the minor and grant judicial consent, setting forth grounds for so finding; or (3) deny the minor's petition, setting forth grounds on which it was denied. Either the minor or her parents or guardian may appeal from such an order to the Missoui Court of Appeals by giving notice of intent to appeal within twenty-four hours from issuance of the order. The appeal must be perfected within five days of the filing of such notice. The section provides that the Missouri Supreme Court shall, by court rule, provide for expedited appellate review of such cases. Plaintiffs challenge the validity of the consent procedure for minors on the ground that it permits the juvenile court to deny a minor access to an abortion even though she may be sufficiently mature and competent to make the abortion decision on her own.[17]

---

[17] Plaintiffs' attack on this section was not limited to a single issue. They also argued that the section is unconstitutional because (1) it mandates parental involvement in all cases, contrary to *Bellotti II*, *supra* (plurality opinion of Powell, J.), *see Charles* v. *Carey*, No. 79 C 454 (N.D.Ill. preliminary injunction filed Nov. 16, 1979); *Women's Community Health Center, Inc.* v. *Cohen*, 477 F.Supp. 542 (D.Me. 1979); *Woman's Services, P.C.* v. *Thone*, – F.Supp. – (D.Neb. partial summary judgment filed Aug. 1, 1979); *Leigh* v. *Olson*, No. A3-79-78 (D.N.D. preliminary injunction filed July 9, 1979); (2) it creates an unjustified distinction between two classes of minors, those who consent to carry a pregnancy to term and undergo normal delivery or Caesarian section and those who consent to have an abortion, contrary to the holding in *Wynn* v. *Carey*, 582 F.2d 1375 (7th Cir. 1978); (3) the alternative judicial proceeding constitutes an undue burden on the abortion decision, *see Wynn* v. *Carey*, *supra*; (4) the statute is unconstitutionally vague because the term "emancipated" is not defined; and (5) that

(Continued on next page)

In *Planned Parenthood* v. *Danforth, supra,* the Supreme Court struck down a requirement that unmarried minors obtain the consent of a parent or person in loco parentis.

> [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy regardless of the reason for withholding the consent.

428 U.S. at 74, 96 S.Ct. at 2843. The Court further defined the constitutional limitations in this area in *Bellotti* v. *Baird (Bellotti II),* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), in which it concluded:

> [I]f the State decides to require a pregnant minor to obtain one or both parent's consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.

443 U.S. at 643, 99 S.Ct. at 3048, 61 L.Ed.2d at 813 (plurality opinion of Powell, J.). In *Bellotti II* the Court considered a Massachusetts consent for minors statute which provided:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary.

Footnote continued
the judicial proceeding outlined in the section does not assure the "anonymity and sufficient expedition" required in *Bellotti II, supra,* (plurality opinion of Powell, J.), because it simply authorizes the future promulgation of rules to expedite appellate review in such cases. It is unnecessary to reach these arguments.

443 U.S. at 625, 99 S.Ct. at 3039, 61 L.Ed.2d at 802. Because the statute was susceptible of a construction which might sustain its validity, the Supreme Court initially abstained so that the courts of Massachusetts might provide a conclusive interpretation. *Bellotti* v. *Baird (Bellotti I)*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). The Supreme Judicial Court of Massachusetts interpreted the statute to authorize the court to refuse its consent if it determined that an abortion would not be in the best interests of the minor, even though the minor might be capable of making an informed and reasonable decision herself. 443 U.S. at 650, 99 S.Ct. at 3051-52, 61 L.Ed.2d at 817-18. The Supreme Court found the Massachusetts statute, as interpreted, constitutionally invalid.

> [I]f the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently. We therefore agree with the District Court that [the statute] cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.

443 U.S. at 650, 99 S.Ct. at 3052, 61 L.Ed.2d at 818 (plurality opinion of Powell, J.).[18]

443 U.S. at 654, 99 S.Ct. at 3053, 61 L.Ed.2d at 820 (concurring opinion of Stevens, J.).

Section 188.028.2(4) of the Missouri Act requires the

---

[18] [The Massachusetts statute] does, of course, provide an alternative in the form of a suit initiated by the woman in Superior Court. But in that proceeding, the judge is afforded an absolute veto over the minor's decisions, based on his judgment of her best interests.

juvenile court determine the issue of consent in one of three ways.

> (4) In the decree, the court shall for good cause:
>
> (a) Grant the petition for majority rights for the purpose of consenting to the abortion; or
>
> (b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or
>
> (c) Deny the petition, setting forth the grounds on which the petition is denied;
>
> . . . . .

Defendants content that the court may deny the petition "provided that it finds that the minor is not mature, and that an abortion would not be in her best interest." Defendants' Post-trial Brief at 26. This procedure cures the defect in *Bellotti II*, say defendants, "because there is no opportunity for judicial authorization for an abortion to be withheld where a minor is found to be mature and competent to make the decision independently . . . ." *Id.*, at 27.

This Court is unable to subscribe to defendants' reading of the statute. Although the juvenile court is authorized to select one of three alternatives, each of the three is clearly independent of the others, connected in the statute with the disjunctive "or." Alternative (c) permits the court to "deny the petition," guided only by the general standard that such action be "for good cause." Defendants suggest that the legislative intent is clear that the juvenile court may deny the minor's petition *only* if it finds that abortion is not in the best interests of the minor *and* that the minor is not competent to decide for herself. Such an intent is not evident in the statute nor was any such showing made at trial. It is clear to this Court that

alternative (c) authorizes the juvenile court to deny the minor's petition for good cause, but does not require a prior finding that the minor is not sufficiently mature and not competent to make a decision regarding abortion independently.

Defendants alternatively request that the Court abstain from ruling, citing *Bellotti I*. In that case the Supreme Court said that abstention is appropriate if an unconstrued state statute is susceptible to a construction which might avoid the need for federal constitutional adjudication,[19] 428 U.S. at 146-47, 96 S.Ct, 2857, and found that particular statute susceptible to such a construction. It is clear to this Court that section 188.028 is not susceptible to a reasonable construction which would avoid the federal constitutional question controlling in *Bellotti II*. The statute permits the juvenile court to deny the minor's application but does not require that the court first find the minor not competent to make a decision independently. Accordingly, the Court declines to abstain.

The consent procedure in section 188.028 permits judicial authorization for an abortion to be withheld from a minor who is sufficiently mature and competent to make a decision regarding abortion independently, contrary to the ruling in *Bellotti II*. It creates the absolute veto proscribed in *Danforth* and, under that case and *Bellotti II*, is unconstitutional. *Scheinberg* v. *Smith*, 482 F.Supp. 529 (S.D.Fla.1979) (see memorandum opinion accompanying preliminary injunction filed July 13, 1979, *sub nom. Jones* v. *Smith*); *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172 (N.D.Ohio 1979).

---

[19] The Court noted that the rule of the Supreme Judicial Court of Massachusetts which permits certification of questions directly to that court for prompt resolution "greatly simplifie[d]" the Court's analysis. There is no such procedure in Missouri.

V.

Abortion After Viability

[6] Section 188.030 regulates abortion in cases in which the fetus has reached viability. In three subsections, the statute prescribes when post-viability abortions may be performed, regulates the abortion technique to be employed, and requires the attendance of a second physician and a specified standard of care. Each subsection will be discussed in turn.

Defendants initially contend that no plaintiff has standing to challenge any part of section 188.030 because no plaintiff presently performs or desires to perform abortions past the stage at which the fetus is viable. Plaintiff Dr. Naim Kassar testified that, in the interests of maternal health, he has performed an abortion as late as approximately twenty-eight weeks gestation. Although the Supreme Court stated that it is not the function of either the legislature or the courts to place viability at a specific point in the gestation period, *Danforth, supra,* 428 U.S. at 64, 96 S.Ct. 2831, the Court noticed in *Roe* that viability usually had been placed at about twenty-eight weeks, but could occur as early as twenty-four weeks. *Roe, supra,* 410 U.S. at 160 93 S.Ct. 705. Enforcement of section 188.030 would have an immediate and direct effect on the medical practice of Dr. Kassar; he therefore has standing to contest its constitutional validity.

Subsection 1 provides that "[n]o abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman" and requires the physician certify in writing that such an abortion is necessary to preserve the life or health of the woman, the medical indications for the abortion, and the probable health consequences. The Act's penalty section mandates criminal liability for "[a]ny person who contrary to the

provisions of [the Act] knowingly performs . . any abortion . . . ." Plaintiffs argue that subsection 1, in conjunction with imposition of criminal liability, is unconstitutionally vague because it sets no standards regarding the determination of viability by the physician. Plaintiffs further argue that the subsection is unconstitutional because it would impose strict criminal liability on a physician for an erroneous, but good faith, determination of fetal nonviability.

In *Colautti* v. *Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) the Supreme Court ruled on a Pennsylvania statute which provided that "[e]very person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable," that the physician exercise a specified standard of care. Plaintiffs in that case argued that the viability determination requirement was unconstitutionally vague because it failed to inform the physician when his duty to the fetus arose and because it did not make the physician's good faith determination of viability conclusive.

The Court held the Pennsylvania viability determination requirement void for vagueness because of a "double ambiguity." The statute set no clear standard regarding the doctor's determination of fetal viability; whether it was to be a purely subjective determination or whether the physician was subject to a mixed subjective and objective standard.

> In other words, it is ambiguous whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending physician, or "sufficient reason" from the perspective of

> a cross-section of the medical community or a panel of experts. The latter, obviously portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center.

Id., 439 U.S. at 391, 99 S.Ct. at 683, 58 L.Ed.2d at 606-07. Inclusion of the phrase "may be viable" injected a second ambiguity: whether the statute delineated some new time period in a pregnancy during which there might be a remote possibility of viability somewhere short of "viability" itself.

Compounding the vagueness of the statute, said the Court, was the fact that it "subjects the physician to potential criminal liability, without regard to fault." Although the criminal penalty provision did require scienter *with respect to the act of abortion*, there was no requirement of a culpable mental state *regarding the doctor's determination that the fetus is or "may be" viable.*[20]

> Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." [citation omitted]

---

[20] The Court noted that the statute did provide a subjective standard for the determination of viability, and that it was ambiguous whether that standard also applied to the determination that the fetus "may be viable." However, the application of a subjective standard did not avoid the strict criminal liability issue. "A subjective standard keyed to the physician's individual skill and abilities, however, is different from a requirement that the physician be culpable or blameworthy for his performance under such a standard." *Collautti* v. *Franklin*, 439 U.S. at 395, 99 S.Ct. at 685, 58 L.Ed.2d at 609 n. 12.

The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Id., 439 U.S. at 395, 99 S.Ct. at 685, 58 L.Ed.2d at 609-10. However, because the viability determination requirement was "void on its face," the Court in *Colautti* declined to decide in that case "whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability."

The Missouri regulation prohibits the abortion of a viable fetus, with the exception of necessity to preserve the life or health of the woman, and subjects the physician to criminal liability for its violation. Although the penalty provision requires a culpable mental state, "knowingly," regarding the act of abortion, neither the penalty section nor the substantive prohibition contains a culpable mental state requirement regarding the attending physician's necessary determination of fetal viability or nonviability. By its own terms, the statute is absolute. The physician who performs an abortion based on his good faith determination, in the exercise of his best medical judgment, that the fetus is not viable is subject to strict criminal liability if his determination is erroneous, regardless of his state of mind. Thus, the question deferred by the Supreme Court in *Colautti* is presented to this Court.

The record in this case relating to the determination of viability parallels that described by the Court in *Colautti*. The determination by the attending physician whether any particular pregnancy has passed the point of fetal viability is based on a number of variables, none of which is susceptible of precise determination, and is uncertain at best. Further, there is a difference of medical opinion regarding the probability of survival necessary before a fetus may be considered "viable."

The Supreme Court affirmed in *Danforth* that viability is a medical concept involving the judgment of the attending physician and his skill and technical ability, and by its nature is flexible and imprecise, varying with each pregnancy. It is clear to this Court that strict criminal liability attending upon an erroneous determination by a physician that a particular pregnancy had not yet reached the point of viability not only offends due proc-

ess[21] but denies the attending physician presented with a woman whose pregnancy is close to the point of viability "the room he needs to make his best medical judgment." *Doe* v. *Bolton*, 410 U.S. at 192, 93 S.Ct. at 747; *Colautti* v. *Franklin, supra*.[22] Accordingly, the regulation in subsection 1, which incorporates strict criminal liability for an erroneous determination of viability, cannot stand.

[7] Subsection 2 of § 188.030 requires that a physician performing an abortion past the point of viability utilize the abortion technique "most likely to preserve the life and health of the unborn child." The subsection further provides that the physician "may" employ some other abortion technique in cases.

> where the method of technique of abortion which would most likely preserve the life and health of an unborn

---

[21] *See Morissette* v. *United States*, 342 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.Ed.2d. 288 (1952):

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of human will and a consequent ability and duty of the normal individual to choose between good and evil.

In *Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960), then Judge, now Justice, Blackmun described the type of offense in which the absence of a culpable mental state would not offend due process:

> [W]here it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch. . . .

The penalty provision of the Missouri Abortion Act, § 188.075, RSMo, provides that a violator is guilty of a class A misdemeanor which is punishable by a term of imprisonment not to exceed one year, § 558.-011.1(5), RSMo, and a fine not exceeding $5,000, § 560.021.1(2).

[22] The Supreme Court also noted in *Colautti* that strict criminal liability could have "a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment."

> child *would present a greater risk* to the life and health of the woman than another available method or technique. (emphasis added)

The subsection goes on to require in such cases that the performing physician certify in writing the techniques considered and the reasons for choosing the technique actually employed. Plaintiffs argue that subsection 2 is defective for the same reasons as is subsection 1; that it is unconstitutionally vague and that it subjects the physician to criminal liability without a culpable mental state.

The requirements of the subsection are triggered initially by the physician's determination of fetal viability. The physician is then called upon to determine which abortion technique is "most likely to preserve the life and health" of the fetus. The physician also must decide whether that technique mandated by the statute presents a "greater risk to the life and health of the woman" than some other abortion technique. These medical decisions and others of the same nature are a fundamental part of the daily practice of medical doctors; they have been and will be made every day, completely aside from this statutory requirement. Because of the nature of the science and art of medical practice, these determinations are often uncertain and difficult to make. Experts may, and often do, disagree on their resolution, both in specific cases and as general propositions.[23] Through the penalty provision, subsection 2 imposes strict liability for an

---

[23] This record contains conflicting testimony from medical experts regarding the relative safety to the woman and to the fetus of various post-first trimester abortion techniques.

Testimony of Drs. Allen Palmer, Naim Kassar, Robert Crist, and Bernard Nathanson. *See Colautti* v. *Franklin*, 439 U.S. at 401, 99 S.Ct. at 688, 58 L.Ed.2d at 612: "The choice of an appropriate abortion technique, as the record in this case so amply demonstrates, is a complex medical judgment about which experts can—and do—disagree."

error in *any* of the above medical decisions, regardless of the physician's state of mind. For the reasons discussed in relation to subsection 1, the Court also finds subsection 2 to be contitutionally deficient. *See Colautti* v. *Franklin, supra.*

[8, 9] Subsection 2 also suffers from the vagueness fatal to the Pennsylvania statute considered by the Supreme Court in *Colautti.* Although the first sentence of subsection 2 mandates utilization of the abortion technique most favorable to the life and health of the fetus, the second sentence informs the doctor that he "may" use another technique, if that prescribed in the first sentence presents "a greater risk to the life and health of the woman" than some other technique. In this case, and as noted by the Supreme Court in *Colautti,* 439 U.S. at 400, 99 S.Ct. at 688, 58 L.Ed.2d at 612:

> it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.

The difficulties noted by the Supreme Court are present in subsection 2. The lack of a culpable mental state requirement compounds the uncertainty. *Colautti* v. *Franklin, supra.*[24]

---

[24] Defendants contend that the intent of the subsection is clearly not to require that the life of the fetus be favored over the life of the mother, and alternatively urge abstention in favor of a construction of

(Continued on next page)

[10] Subsection 3 requires the attendance of a second physician at any abortion performed past the point of viability, "who shall take control of and provide immediate medical care for a child born as a result of the abortion." It also prescribes a standard of care to be exercised by both physicians:

> [They] shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

As with the two previous subsections, the Act's penalty provision imposes criminal liability on the physician who performs an abortion in violation of the regulation due to an erroneous determination of nonviability, without regard to the doctor's mental state. For the reasons dis-

---

Footnote continued
the provision by the courts of Missouri should this Court find otherwise, citing *Bellotti I*. The judge-made doctrine of abstention, *see Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941), is appropriate in a case in which a challenged state statute is susceptible to a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967). On the other hand, if it cannot be fairly concluded that the statute can be reasonably construed so as to avoid the necessity for federal constitutional adjudication, abstention is inappropriate and would amount to a shirking of the responsibilities of the federal courts. *Kusper* v. *Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973). Because subsection 2 of § 188.030 is defective due to the absence of a culpable mental state requirement, the Court is not convinced that resolution of the vagueness issue, *i. e.*, whether the duty of the physician to his female patient is paramount to the physician's duty to preserve the life and health of the fetus, by a definitive interpretation of the subsection by the Missouri courts would avoid eventual federal constitutional adjudication. The court again notes that there is no procedure to certify questions for prompt resolution to the Missouri Supreme Court. *See Bellotti I*, 428 U.S. at 150-51, 96 S.Ct. 2857.

cussed above, the Court finds this imposition of strict criminal liability with regard to a medical judgment unconstitutional.

[11, 12] The requirement of a second physician is also overbroad. The record shows that dilatation and evacuation may be the procedure of choice, even after viability, in cases in which there are positive contraindications to use of saline or prostaglandins instillation.[25] The experts agreed that D & E carries no chance of fetal survival. The Supreme Court has held that legislative enactments in this area involving fundamental rights "must be narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, 410 U.S. at 155, 93 S.Ct. at 728; *Carey* v. *Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The state has an important and legitimate interest in potential life and may regulate abortion after viability to preserve the life and health of the fetus. *Roe* v. *Wade*, *supra*. Although the presence of a second physician to care for the child born as a result of a post-viability abortion certainly may further the state's interest in the protection of potential life, the attendance of a second physician during an abortion procedure which holds no possibility of fetal survival does not further that interest. The two-physician regulation is therefore overboard and invalid on that basis.

VI.

Informed Consent

[13] Section 188.039 prescribes a procedure to be followed by the woman's physician to secure and document her informed consent to the abortion. The physician must certify: (1) that he informed the woman of the informa-

---

[25] Testimony of Drs. Robert Crist (for plaintiffs) and Richard Schmidt (for defendants).

tion specified in the statute not less than forty-eight hours prior to her giving her consent to the abortion; (2) if the woman is a minor, that he also provided her parent, legal guardian, or person standing in loco parentis the same information; and (3) the woman's age, based on "proof of age" provided by her. The woman must sign a consent form to acknowledge that she has been informed by the attending physician of the following:

> (1) That according to the best medical judgment of her attending physician she is pregnant;
>
> (2) The number of weeks elapsed from the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physical examination and appropriate laboratory tests;
>
> (3) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;
>
> (4) The immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and still births following abortion;
>
> (5) The particular risks associated with the abortion technique to be used;
>
> (6) Alternatives to abortion shall be given by the attenting physician, including a list of public and private agencies and services that will assist her during her pregnancy and after the birth of her child.

The section further provides that the physician may inform the woman of "other material facts or opinions"

which may be necessary to allow the woman to be fully informed of the nature and consequences of an abortion.

Plaintiffs contend that the section's requirement that the information be given by the attending physician, rather than some other person, is unduly burdensome. At the clinic of plaintiff Reproductive Health Services, information relating to the woman's informed consent to an abortion, including much of the information required by the statute, is presented through an "informed consent" videotape of a doctor discussing the abortion procedure and through sessions with lay counselors, and does not come directly from the physician who actually performs the abortion procedure. Plaintiffs claim that this system was devised as the most efficient and economical method of delivery of this particular medical service and that it would be disrupted if the attending physician had to spend more time with each patient than is presently the practice, thereby increasing the cost of each procedure.[26] An

---

[26] Testimony of Judith Widdicombe, R. N., Executive Director of Reproductive Health Services. Ms. Widdicombe estimated that the cost per procedure would increase by $70 if the attending physician were required to spend an additional 30 minutes with each patient.

Plaintiffs also argue that this requirement, in conjunction with the 48 hour waiting period, could result in delays of substantially more than 48 hours. Physicians perform abortions at Reproductive Health Services' clinic on a part-time basis, perhaps one afternoon per week. If the physician must give information to each patient on whom he performs an abortion 48 hours prior to the procedure, say plaintiffs, delays of one week or more would result, simply because the doctor would not be present at the clinic for at least a week after the initial session with the patient. Plaintiffs argue that the patient's personal schedule might delay the procedure even longer if she could not arrange to come to the clinic on the day on which the physician who presented the information to her was in attendance. The Court notes that plaintiffs have made a showing that the combination of a mandatory waiting period with the requirement that certain information be conveyed by the physician who actually performs the abortion

(Continued on next page)

effect of the requirement will be that the doctor who performs the abortion may have to spend more time with each patient than is currently the practice in plaintiffs' clinics. This may result in increased costs, although the additional expense to the patient will certainly depend on the amount of information required to be present directly by the physician and the actual time required by a particular physician to convey it. On this record, the Court is not convinced that the requirement that information important to the woman's decision to have an abortion come directly from the attending physician is an undue burden on her decision to abort or her obtaining an abortion.[27] The Supreme Court has emphasized the participation and responsibility of the woman's physician regarding the decision to have an abortion and has noted the legitimacy of the state's interest that she make the decision with full knowledge of its nature and consequences. *Planned Parenthood* v. *Danforth, supra.* A requirement that the attending physician personally provide information regarding the abortion decision furthers that interest and is not unconstitutional.[28]

[14] Plaintiffs challenge the forty-eight hour waiting

Footnote continued

would present a practical problem to plaintiff's clinics, one result of which could be significant delay between the woman's initial visit and the abortion itself. The 48 hour waiting period has been stricken as an unconstitutional burden on obtaining an abortion.

[27] Testimony regarding the time necessary for a physician to present *all* of the information specified in the statute ranged from 15 minutes to an hour and a half. Some items specified in the section have been stricken as unconstitutional.

It is conceivable that a regulation might require a presentation by the attending physician so lengthy as to become unduly burdensome, although such a finding is not supported by this record.

[28] *See Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F.Supp. 1172 (N.D. Ohio 1979); *Women's Community Health Center, Inc.* v. *Cohen,* 477 F.Supp. 542 (D.Me. 1979).

period as an undue burden on the abortion decision which actually increases the risk to the woman's health. The experts seem to be in accord that the length of gestation at the time of abortion is directly related to the risk presented by the procedure to the woman's life and health, the risk increasing the later an abortion is performed.[29] The Court is convinced that the forty-eight hour delay imposed by the statute would have, in the words of plaintiffs' expert, a "significant health impact" on a woman seeking an abortion.[30] There was additional testimony that a mandatory forty-eight hour waiting period could have the effect of a much longer delay due to the nature of physicians' working schedules.[31] The record shows that such delay has a disproportionate impact on minors, who generally seek abortions at a later stage of pregnancy.[32]

Defendants argue that the waiting period is designed to ensure that the abortion decision is made with "adequate reflection and consideration," and as such furthers the state's interest in maternal health. However, there was expert testimony at trial which indicated that, as a general proposition, women seeking abortions have completely

---

[29] Within the first 12 weeks, the main risk to a woman who wants an abortion results from delay.

. . . . .

Our findings clearly demonstrate that *any* delay increases the risk of complications to a pregnant woman who wishes an abortion. (emphasis in original)

Willard Cates, Jr., et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Family Planning Perspectives 266, 267-68 (1977) (reprinted by Public Health Service, U.S. Dep't of H.E.W.)

[30] Testimony of Dr. Robert Crist.

[31] Testimony of Drs. Allen Palmer and Robert Kretzschmar. *See* note 26, *supra*.

[32] Testimony of Drs. Enrique Vera, Robert Kretzschmar, Grace Ketterman, and Dr. Elizabeth Smith. *See* note 15, *supra*.

thought out the abortion decision prior to approaching a clinic or personal doctor.[33]

The forty-eight hour waiting period requires that a woman make a minimum of two visits to her physician or to a clinic. This requirement involves additional time and expense and, for women living outside the metropolitan areas, may require additional travel or subsistence expense during the delay.

This Court concludes that the mandatory forty-eight hour waiting period has, in fact, a detrimental effect on the health interests of women seeking abortions and therefore lacks a rational relation with any legitimate state interest. Moreover, the mandatory waiting period is unduly burdensome to women seeking abortions. *Bellotti I. supra.* For both reasons, the mandatory forty-eight hour waiting period is unconstitutional.[34]

[15] Plaintiffs claim that the requirement that the physician certify the woman's age based upon "proof of age offered by her" is void for vagueness. The Court cannot agree. A physician's good faith certification of a woman's age based on as little proof as the woman's own declaration or written statement of her age would satisfy the statute. There is no constitutional infirmity.

[16] In the case of a minor, subsection 2 requires that not only she but also "her parent or legal guardian or person standing in loco parentis" be informed of specified

---

[33] Testimony of Dr. Enrique Vera.

[34] *Accord, Womens Services, P.C.* v. *Thone,* 483 F.Supp. 1022 (D.Neb. 1979) (48 hours); *Women's Community Health Center, Inc.* v. *Cohen,* 477 F.Supp. 542 (D.Me. 1979) (48 hours); *Leigh* v. *Olson,* No. A3-79-78 (D.N.D. preliminary injunction filed July 9, 1979) (48 hours); *But see Wolfe* v. *Schroering,* 541 F.2d 523 (6th Cir. 1976) (24 hours). (no argument that delay "significantly burdens the abortion process"); *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F.Supp. 1172 (N.D.Ohio 1979) (24 hours).

information by the attending physician before she may obtain an abortion. The Court agrees with plaintiffs' contention that this regulation constitutes an undue burden on a minor seeking an abortion. The subsection makes no distinction between a minor still living in her parents' home and an emancipated minor who might be living independently and at some distance from her parents or guardian. The requirement contains no exception, for instance, for parents who may be difficult to contact or who may live thousands of miles from the location of the attending physician. It does not provide that absent parents or parents impossible to contact may be informed constructively. As written in this subsection, the requirement that parents or guardian be informed prior to a minor obtaining an abortion could inject substantial delay into the process and, in some cases, could constitute an insurmountable obstacle. It is unconstitutional as an undue burden on a minor seeking an abortion.

[17] Plaintiffs' remaining objections to section 188.039 concern the specific information required to be presented by the attending physician to every woman seeking an abortion. This regulation to ensure "truly informed consent" must be considered in light of *Planned Parenthood* v. *Danforth*, in which the Supreme Court upheld a prior Missouri requirement that the woman give "informed" consent in writing. Answering a vagueness challenge to the term "informed," the Court stated, 428 U.S. at 67 n.8, 96 S.Ct. at 2840:

> [w]e are inclined to accept, as the meaning [of "informed" consent], the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

The Eighth Circuit interpreted that statement in *Freiman* v. *Ashcroft*, 584 F.2d 247, 251 (8th Cir. 1978), *summarily aff'd*, 440 U.S. 941, 99 S.Ct. 1416, 59 L.Ed.2d 630 (1979). "[T]he Supreme Court did not hold that a state may require physicians to provide to each patient any and all information required by the state, regardless of its legality, truth, constitutionality or medical advisability." The state has a legitimate interest in protecting women by ensuring that the decision to have an abortion is made with knowledge of the nature and consequences of the abortion procedure. *Planned Parenthood* v. *Danforth*, *supra*. However, specific regulations in this area may not, consistent with the reasoning in *Danforth*, have a "straitjacket" effect on the attending physician. There is a danger that specific information requirements may force the physician to do something *other* than what he considers to be best for his patient.[35]

The first two items require the physician to inform the woman "[t]hat according to the best medical judgment of her attending physician she is pregnant," and "[t]he number of weeks elapsed from the probable time of conception . . . ." Both plaintiffs' and defendants' experts testified that, apart from the statute, presenting such information to the patient seeking an abortion is good medical practice and would be done as a matter of course in almost all abortion cases. It is the exception which underlies plaintiffs' constitutional objection to these items.

[18] The procedure known as menstrual extraction is the removal of uterine contents prior to a positive pregnancy test. The purpose of the procedure is to correct a menstrual disorder and/or to abort a very early preg-

---

[35] Testimony of Dr. Enrique Vera.

nancy.[36] At the stage at which the procedure is done it is not presently possible to determine whether the woman is in fact pregnant;[37] in practice the procedure is done with disregard to that question.[38] A menstrual extraction is intended to and in many cases does result in an abortion. Because the statute requires the physician to tell his patient that she *is* pregnant[39] and the length of her pregnancy prior to performing an abortion, a menstrual extraction performed prior to a positive pregnancy test and resulting in an abortion is unlawful. This could cause a woman seeking an early abortion to wait until such time as current technology enabled her physician to determine that she is in fact pregnant. A regulation which has the effect of outlawing a safe abortion technique utilized in the very early stages of pregnancy does not survive even rational basis inquiry.[40]

[19] The physician also is required to relate to every woman who seeks an abortion the "probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed" and the "immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased

---

[36] Dr. Robert Crist estimated that, within a reasonable medical certainty, 85% of those women with a menstrual period 10 days late are, in fact, pregnant.

[37] Testimony of Drs. Allen Palmer, Robert Crist, Robert Kretzschmar, and Richard Schmidt. There is nothing in this record to indicate the existence of a reliable pregnancy test at this early stage of pregnancy.

[38] Testimony of Dr. Allen Palmer.

[39] The statute does not require the physician to tell his patient *whether* she is pregnant; it requires the affirmative statement that she *is* pregnant.

[40] *Contra, Planned Parenthood* v. *Fitzpatrick*, 401 F.Supp. 554 (E.D.Pa. 1975), *summarily aff'd sub nom. Franklin* v. *Fitzpatrick*, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed.2d 1205 (1976) (this issue was not part of that appeal).

incidence of premature births, tubal pregnancies and still births following abortion." From the testimony and other evidence presented at trial, the Court concludes that these two items constitute an impermissible intrusion into the privacy of the doctor-patient relationship and interfere with the right of a woman to consult with her physician regarding abortion free from state interference.[41]

It is clear that many physicians believe that a mandatory presentation on fetal anatomy and physiology is not in the best health interests of many, if not all, of their patients seeking abortions. There was evidence that most women seeking an abortion do not desire such anatomical information[42] and that the giving of such information may have adverse effects in the form of emotional tension, increased anxiety and fright.[43] It is also clear that many physicians believe that there are no longterm physical or psychological effects of abortion or are unaware of such effects.[44] It is certainly not for this Court to say whether such long-term dangers actually exist. It is sufficient to note that the evidence demonstrates that many physicians believe that such information is highly debatable or is simply not factual, based on present medical knowledge.

It is evident that such physicians, in the exercise of

---

[41] Plaintiffs also make a strong argument that the requirement that the physician relate the "probable anatomical and physiological characteristics" of the fetus, enforced by criminal sanctions, is void for vagueness.

[42] Testimony of Dr. Robert Kretzschmar and Dr. Elizabeth Smith.

[43] Testimony of Drs. Allen Palmer, Robert Crist, Naim Kassar, and Enrique Vera. These experts also testified that such adverse emotional effects may require use of anesthetics in greater amounts, thereby increasing risk to the woman's health.

[44] Testimony of Drs. Allen Palmer, Naim Kassar, Robert Crist, and Robert Kretzschmar. Dr. Richard Dickey testified to the contrary, that induced abortion may carry a risk to the woman's future fertility and may cause a greater likelihood of spontaneous abortion (miscarriage) in subsequent pregnancies.

their best medical judgment, would choose not to provide their patients seeking abortions with a detailed anatomical description of the fetus. It is also evident that such physicians would choose not to provide information regarding long-term dangers they believe not to exist. These two requirements impose the "straitjacket" foreseen in *Planned Parenthood* v. *Danforth*. They mandate what must be presented by the physician *to each and every patient*, regardless of the doctor's view on the subject or his professional opinion of the medical advisability of presenting such information in any particular case. These requirements deprive the woman seeking an abortion of the right to consult with her physician and rely on his discretion and professional judgment. *Roe* v. *Wade, supra*.[45]

[20-22] The final two items required to be presented to the woman seeking an abortion are "[t]he particular risks associated with the abortion technique to be used" and the "alternatives to abortion," including "a list of public and private agencies and services that will assist her during her pregnancy and after the birth of her child." Information regarding the risks associated with the technique to be employed and the alternatives available to the woman may be required by the state to ensure informed consent consistent with *Planned Parenthood* v. *Danforth*. *See Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976); *Women's Services, P.C.* v. *Thone*, ____ F.Supp. ____ (D.Neb. 1979). However, the requirement that the attending physician provide each of his patients with "a list of agencies" is void for vagueness. It is revealing to consider

---

[45] *See Freiman* v. *Ashcroft*, 584 F.2d 247 (8th Cir. 1978), *summarily aff'd*, 440 U.S. 941, 99 S.Ct. 1416, 59 L.Ed.2d 630 (1979); *Women's Services, P.C.* v. *Thone*, 483 F.Supp. 1022 (D.Neb. 1979); *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172 (N.D.Ohio 1979); *Leigh* v. *Olson*, No. A3-79-78 (D.N.D. preliminary injunction filed July 9, 1979).

the range of testimony of both sides' experts describing the list which is required to be furnished, at the risk of criminal liability for non-compliance: "a list of *all* such agencies (there may be several hundred)"; "it is impossible to compile a complete list"; "it would include every agency in the metropolitan area"; "it would include only one public and one private agency"; "it would include only those agencies of which the physician was personally aware." A criminal statute which fails to give a person of ordinary intelligence fair notice of what is required or proscribed is unconstitutionally vague. *United States* v. *Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The Court finds that the "list of agencies" requirement fails to provide physicians with the fair notice that is constitutionally required.

[23] The Court finds that the Missouri General Assembly would have enacted those parts of section 188.039 not declared unconstitutional independently from the stricken portions, and further finds that the valid provisions are not so connected and so dependent upon the stricken provisions as to preclude that finding. Accordingly, the provisions declared to be unconstitutional will be severed and stricken, allowing the remainder of the section to stand.[46] *See* § 1.140, RSMo; *United States* v. *Jackson*, 390 U.S. 570, 585, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

VII.

Pathology Report

[24] Section 188.047 requires that a sample of the tissue removed at the time of abortion be submitted to a path-

---

[46] Of course, the reference in § 188.039.1 to "the information contained in subsection 2 of this section" may refer constitutionally only to those portions of subsection 2 not declared invalid.

ologist, who must file copies of the tissue report with the facility at which the abortion is performed and with the state division of health. Plaintiffs contend that the additional cost of a tissue examination is unduly burdensome and that the requirement of an exaxmination by a pathologist in every abortion case cannot be justified under traditional medical cost/benefit analysis; that such an examination in every case is simply unnecessary and serves no rational purpose.[47] The Court has not been shown that the increase in cost per abortion procedure resulting from the required tissue examination will constitute an undue burden on a woman seeking an abortion.[48] Defendants argue that the required tissue examination furthers the state's legitimate interest in the maintenance of good medical standards. In spite of plaintiffs' contentions that the tissue examination required by the statute is duplicative and not justifiable as a procedure to be done in every case, this Court cannot say that such a required examination is not rationally related to a legitimate state interest in the standard of medical care provided its citizens who undergo abortions.[49] The section is not unconstitutional. *See Wynn* v. *Scott*, 449 F.Supp. 1302, 1322 (N.D.Ill. 1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979).

---

[47] Plaintiff physicians testified that a gross or macroscopic examination of the tissue removed during abortion is done in any event by the performing physician, who then decides whether examination by a pathologist is indicated. Ms. Widdicombe testified that a tissue examination by a pathologist is ordered in only 12% of abortion cases at Reproductive Health Services' clinic.

[48] The expert's testimony regarding the cost per patient of a required tissue examination by a pathologist ranged from $10 to $40. Ms. Widdicombe's estimate of the cost of compliance for plaintiff Reproductive Health Services was $19.40 per abortion procedure.

[49] Several of defendants' medical experts testified that pathology should be done in every case of abortion. Testimony of Drs. Bernard Nathanson, Pierre Keitges, Richard Schmidt, and Daniel Martin.

VIII.

Reporting Requirements

[25] Section 188.052 imposes recordkeeping and reporting obligations regarding the abortion procedure itself and the treatment of any resulting complications.[50] The Court finds the requirements contained in this section to be consistent with the holding in *Planned Parenthood* v. *Danforth* and therefore constitutional. *See Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976). As did the Supreme Court in *Danforth*, this Court relies on the assumption that such regulations will not be utilized and enforced in such a way as to constitute an undue burden through the sheer volume of recordkeeping.

IX.

Regulation of Abortion-Related Counseling

[26] Section 188.063 regulates counseling services relating to abortion. It sets minimum standards of education and training for counselors and regulates the content of counseling offered to pregnant women by requiring discussion of specified topics. The Court need not look beyond plaintiffs' equal protection argument.[51] By its own terms, the section applies only to an "abortion facility." The Act defines "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed *other than a hospital.*"

---

[50] Section 188.055 provides that all recordkeeping and reporting required under the Act shall be confidential and used only for statistical purposes.

[51] Plaintiffs make a compelling argument that the section is also void for vagueness because it involves the imposition of criminal liability for behavior to be measured by vague statutory standards, *e. g.*, "appropriate field," "factual information," "not to be misleading," "explicit discussion," and "thorough discussion."

§ 188.015(2), RSMo (the Court's emphasis). Thus, the section regulates counseling services relating to abortion offered in clinics, such as those operated by the corporate plaintiffs, but leaves the same services unregulated if offered in a hospital. Defendants offer no justification, either related to the purpose of the regulation or otherwise, for such differences in treatment. With respect to abortion-related counseling services, the Court finds no rational reason for the distinction between hospitals and abortion facilities other than hospitals. The section is unconstitutional as violative of the equal protection clause of the fourteenth amendment of the Constitution.

X.

Conclusion

For the reasons above-stated, the following portions of the 1979 Missouri act relating to the regulation of abortions are hereby declared to be unconstitutional:

1. § 188.025;

2. § 188.028;

3. § 188.030;

4. The following portions of § 188.039:

   A. From § 188.039.1, the phrase "not less than forty-eight hours prior to her consent to the abortion,";

   B. From § 188.039.2, the phrase "and, if she is a minor, her parent or legal guardian or person standing in loco parentis";

   C. § 188.039.2(1)-(4);

   D. From § 188.039.2(6), the phrase "including a list of public and private agencies and services

that will assist her during her pregnancy and after the birth of her child."

5. § 188.063.

[27] At the conclusion of trial, defendants stated on the record that they will abide by this Court's declaration regarding the validity of any part of the Act. The Court assumes that all prosecutorial authorities of the State of Missouri will likewise abide by this Court's judgment. Accordingly, no injunctive order will issue at this time.

IT IS SO ORDERED.

APPENDIX

AN ACT to repeal sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060, and 188.075, RSMo 1978, relating to regulation of abortions, and to enact in lieu thereof fifteen new sections relating to the same subject, with penalty provisions and an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060 and 188.075, RSMo 1978 are repealed and fifteen new sections enacted in lieu thereof, to be known as sections 188.015, 188.020, 188.025, 188.027, 188.028, 188.030, 188.035, 188.037, 188.039, 188.047, 188.052, 188.055, 188.060, 188.063 and 188.075 to read as follows:

188.015. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purposes of sections 188.010 to 188.085 shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Abortion facility", a clinic, physician's office, or any other place of facility in which abortions are performed other than a hospital;

(3) "Conception", the fertilization of the ovum of a female by the sperm of a male;

(4) "Physician", any person licensed to practice

medicine in this state by the state board of registration of the healing arts;

(5) "Unborn child", the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus;

(6) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems.

188.020. No person shall perform or induce an abortion except a physician.

188.025. Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

188.027. No abortion shall be performed except with the prior, informed and written consent freely given of the pregnant woman.

188.028. 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

(2) Copies of the petition and a notice of the date, time, and place of the hearing shall be personally served upon each parent, guardian or, if the minor's parents are deceased and no guardian has been appointed, any other

person standing in loco parentis of the minor listed in the petition by the sheriff or his deputy. If a parent or guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis cannot be personally served within two days after reasonable effort, the sheriff or his deputy shall give constructive notice to them by certified mail to their last known address and the hearing shall not be held for at least forty-eight hours from the time of the mailing. In any case where there exists the potential or appearance of conflict of interests between the parents or guardian or next friend of the child and the child, the court shall appoint a guardian ad litem to defend the minor's interests. The court shall set forth, for the record, the grounds for such appointment;

(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(4) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

(5) If the petition is allowed, the informed consent of the minor, pursuant to the court grant of majority rights, or the judicial consent, shall bar an action by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion. The immunity granted shall only extend to the performance of the abortion in accordance herewith and any necessary accompanying services which are performed in a competent manner. The costs of the action shall be borne by the parties.

(6) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of the minor pursuant to the court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

188.030.1. No abortion of a viable unborn child shall be performed unless necessary to preserve the life or

health of the woman. Before a physician may perform an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to preserve the life or health of the woman and shall further certify in writing the medical indications for such abortion and the probable health consequences.

2. Any physician who performs an abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of the woman than another available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs an abortion upon a viable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

3. An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman .

188.035. Whoever, with intent to do so, shall take the

life of a child aborted alive, shall be guilty of murder of the second degree.

188.037. No person shall use any fetus or child aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such fetus or child aborted alive.

188.039. 1. No physician shall perform an abortion unless prior to such abortion, the physician certifies in writing that the woman gave her informed consent, freely and without coercion, after the attending physician had informed her of the information contained in subsection 2 of this section not less than forty-eight hours prior to her consent to the abortion, and shall further certify in writing the pregnant woman's age, based upon proof of age offered by her.

2. In order to insure that the consent for an abortion is truly informed consent, no abortion shall be performed or induced upon a pregnant woman unless she has signed a consent form that shall be supplied by the state division of health, acknowledging that she and, if she is a minor, her parent or legal guardian or person standing in loco parentis have been informed by the attending physician of the following facts:

(1) That according to the best medical judgment of her attending physician she is pregnant;

(2) The number of weeks elapsed form the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physical examination and appropriate laboratory tests;

(3) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

(4) The immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and still births following abortion;

(5) The particular risks associated with the abortion technique to be used;

(6) Alternatives to abortion shall be given by the attending physician, including a list of public and private agencies and services that will assist her during her pregnancy and after the birth of her child.

3. The physician may inform the woman of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonable necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

188.047. A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

188.052. 1. An individual abortion report for each abortion performed or induced upon a woman shall be completed by her attending physician.

2. An individual complication report for any post-abortion care performed upon a woman shall be completed

by the physician providing such post-abortion care. This report shall include:

(1) The date of the abortion;

(2) The name and address of the abortion facility or hospital where the abortion was performed;

(3) The nature of the abortion complication diagnosed or treated.

3. All abortion reports shall be signed by the attending physician, and submitted to the state division of health within forty-five days from the date of the abortion. All complication reports shall be signed by the physician providing the post-abortion care and submitted to the division of health within forty-five days from the date of the post-abortion care.

4. A copy of the abortion report shall be made a part of the medical record of the patient of the facility or hospital in which the abortion was performed.

5. The state division of health shall be responsible for collecting all abortion reports and complication reports and collating and evaluating all data gathered therefrom and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.

188.055. 1. Every abortion facility, hospital, and physician shall be supplied with forms by the division of health for use in regards to the consents and reports required by sections 188.010 to 188.085. A purpose and function of such consents and reports shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. All information obtained by physician, hospital, or abortion facility from a patient for the purpose of preparing reports to the division of health under sections 188.010 to 188.085 or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

188.060. All medical records, reports, and other documents required to be kept under sections 188.010 to 188.085 shall be maintained in the permanent files of the abortion facility or hospital in which the abortion was performed for a period of seven years.

188.063. No abortion facility shall advertise or hold itself out as also providing counseling to pregnant women unless:

(1) The counseling is done by a licensed physician, registered nurse or other person holding at least a bachelor's degree from an accredited college or university in psychology or appropriate field or having completed special training in counseling;

(2) The counseling includes factual information given in such a manner as to not be misleading, including explicit discussion of the development of the unborn child; and

(3) The counseling includes a thorough discussion of alternatives to abortion and availability of agencies and services to assist her if she chooses to carry her child to term.

2. The prescribed course of study which shall constitute special training in counseling shall be promulgated by the division of health. Any rule or portion of a rule promulgated pursuant to this chapter may be suspended

by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor.

188.075. Any person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by sections 188.010 to 188.085 shall be guilty of a class A misdemeanor and, upon conviction, shall be punished as provided by law.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

APPENDIX B

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., Naim S. Kassar, M.D., Reproductive Health Services, Allen S. Palmer, D.O., Appellees,

v.

John ASHCROFT, Attorney General of State of Missouri, Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri, Appellants.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., Naim S. Kassar, M.D., Reproductive Health Services, Allen S. Palmer, D.O., Appellants,

v.

John ASHCROFT, Attorney General of State of Missouri, Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri, Appellees.

Nos. 80-1130, 80-1530.

United States Court of Appeals,

Eighth Circuit.

Submitted Nov. 17, 1980.

Decided July 8, 1981.

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HARRIS,* Senior Judge.

LAY, Chief Judge.

This is an appeal and cross-appeal relating to the constitutionality of the Missouri statutes regulating abor-

---

* Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

tion.[1] The trial court denied injunctive relief, but issued a declaratory judgment holding all or part of five sections of the Missouri statutes unconstitutional.

Allen S. Palmer, D.O., and Naim S. Kansar, M.D., licensed physicians, and Planned Parenthood and Reproductive Health Services, corporations that operate abortion clinics in Kansas City and St. Louis,[2] brought suit against John Ashcroft, Attorney General of Missouri, and Ralph Martin, prosecuting attorney of Jackson County, Missouri (in his capacity as Jackson County prosecutor and as representative of the class of Missouri prosecutors).[3]

On appeal the Missouri defendants challenge the district court holding on the unconstitutionality of a provision requiring second trimester abortions to be performed in a hospital, parental or judicial consent requirements for minors, restrictions on abortion of viable fetuses, and "informed consent" requirements. They also challenge the award of attorneys' fees. Planned Parenthood cross-appeals from the district court's refusal to declare unconstitutional provisions requiring: (1) that the "informed consent" information must be given by the attending physician; (2) submission of tissue samples from all abortions to a pathologist; and (3) completion of individual reports on women seeking post-abortion care.[4]

---

[1] The district courts opinion is published at 483 F.Supp. 679.

[2] In order to simplify discussion plaintiffs are hereinafter referred to collectively as "Planned Parenthood".

[3] In order to simplify discussion defendants are hereinafter referred to as "Missouri".

[4] On June 30, 1979, the district court issued a temporary restraining order to prevent enforcement of the challenged statutes. This order was modified on September 27, 1979. At the conclusion of the trial, the defendants gave assurances that portions of the Act declared unconstitutional would not be enforced. 483 F.Supp. at 701.

The district court also dealt with other provisions of the Missouri statutes, but its conclusions on those questions are not challenged on appeal.

We affirm in part, reverse in part and remand for further proceedings.

In summary, we first find that the district court erred in concluding on the present record that the State's requirement that all second trimester abortions be performed in a hospital is unconstitutional. We find that the fact that hospitals allegedly require parental consent for the admission of minors is not an unconstitutional burden imposed by the State. We nonetheless remand this issue to the district court for further findings as to whether the hospitalization requirement is a substantial burden on women patients seeking abortions in the second trimester (at least up to 18 weeks) and if so whether the State has shown a compelling state interest which justifies the requirement.

We reverse the district court's finding that section 188.030 of the Missouri statutes imposed strict criminal liability on doctors who may abort viable fetuses. We find the Missouri law requires scienter (knowledge) by the physician such that it comports with constitutional requirements. We also reverse the district court's holding that subsection 188.030.2 is unconstitutionally vague.

We likewise find the district court erred in holding the provisions relating to parental or judicial consent for a minor's abortion unconstitutional. We think proper interpretation of the judicial consent provision requires a court to grant judicial consent to a mature minor or a minor for whom an abortion is in her best interests. We find, however, that the provision requiring notice to the parents of all minors is unconstitutional because it requires notice to the parents of minors who are mature or minors for whom it is not in their best interest to give notice. We find the remaining portion of section 188.028 constitutional.

We affirm the district court's finding that the requirement of a second doctor during a second trimester abortion is unconstitutional. We likewise affirm its finding that the 48 hour waiting period is unconstitutional. We also agree with the district court that the informed consent provision requiring notice to parents and the provisions for informed consent under subsections 188.039.2 (1), (2), (3), and (4) are unconstitutional. We uphold the district court's findings that the State may require the attending physician to inform the woman as to the particular medical risks associated with the abortion technique to be used and the available alternatives.

Finally, we agree with the district court there is nothing impermissible in the abortion complication reports required by the State. We find section 188.047, requiring pathology reports following all abortions to be an impermissible requirement. We vacate and remand to the district court for reconsideration the constitutionality of the abortion complication reports required under section 188.052.2.

We affirm the district court's award of attorney fees.

I. *Second Trimester Hospitalization Requirement.*

Section 188.025[5] requires that second and third trimester abortions be performed in a hospital. The district court held that this requirement did not reasonably relate to protection of maternal health, because the dilatation and evacuation method (D&E) could be performed safely outside of a hospital up until the 18th week. The court observed that the effect of the hospitalization requirement was to make a second trimester D&E unavailable in Mis-

[5] Section 188.025 states:

Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

Mo.Ann.Stat. § 188.025 (Vernon).

souri because only one hospital in the state allows D&E in the second trimester. Alternatively, the court held that this requirement granted parents the power to veto minor women's decision to have an abortion contrary to *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), because no hospital in Missouri would admit a woman under 18 without parental consent. 483 F.Supp. at 685—87.[6]

A. *Parental Consent for Hospitalization.*

We first address the finding made by the district court that since all hospitals in Missouri require parental consent for abortion to minors the effect of a statute requiring hospitalization is to grant parents the absolute veto forbidden by *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). We must respectfully disagree.

The district court's holding goes a step beyond *Danforth*. In *Danforth*, the *state* required parental consent as a prerequisite for a minor to have an abortion, thus directly interfering with the woman's decision. The present Missouri hospitalization requirement says nothing about parental consent and the State itself has not given

---

[6] Several district courts have recently considered similar challenges to second trimester hospitalization requirements. *See Wolfe* v. *Stumbo*, No. C 80–0285 L(A) (W.D.Ky. Dec. 3, 1980) (unconstittuional); *Gary-Northwest Indiana Women's Services* v. *Bowen*, 496 F.Supp. 894 (N.E.Ind. 1980), *aff'd sub nom. Gary-Northwest Indiana Women's Services* v. *Orr*, ——— U.S. ———, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981) (constitutional); *Margaret S.* v. *Edwards*, 488 F.Supp. 181 (E.D.La. 1980) (unconstitutional). *See also Wynn* v. *Scott*, 449 F.Supp. 1302, 1318 (N.D.Ill. 1978), *aff'd sub nom, Wynn* v. *Carey*, 599 F.2d 193 (7th Cir. 1979) (hospitalization requirement constitutional; no discussion of D&E method; *Hodgson* v. *Lawson*, 542 F.2d 1350, 1354 (8th Cir. 1976) ("The requirement . . . that an abortion be performed in a hospital, which is not challenged here, is an example of permissible state regulation subsequent to the first trimester.").

parents a veto power.[7] Instead, the State has imposed second trimester regulations that it claims are within the State's regulatory power in the second trimester because they are reasonably related to the woman's health. *Roe* v. *Wade*, 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973). The district court's holding would mean that the State could not impose such regulations if they created a situation in which the acts of private entities could interfere with the woman's decision. The problem with this approach to the *Roe* rule is that it would force reevaluation of every health-based second trimester regulation to determine its practical effect, without concern for its health-based justification. For example, Missouri requires that all abortions be performed by a physician. Private physicians may choose not to perform abortions. If statistics showed that no physicians in the state or in some geographic area of the state were willing to perform second trimester abortions on minors without parental consent, the district court's logic would declare the physician requirement unconstitutional.

[1, 2] The point is that when dealing with second trimester regulations, *Roe* declares that the *sole* question is whether the regulation reasonably relates to the woman's health.[8] If the regulation bears a reasonable relation to health, the regulation may and probably will restrict the

---

[7] Missouri also argues that the testimony at trial failed to show that *no* hospitals in the state will admit minors for abortion without parental consent. There was no testimony from any person claiming knowledge of the policies of hospitals throughout the state that no hospital would admit a minor without parental consent. Missouri likewise urges that the record demonstrates that many abortions are performed by physicians on an outpatient basis without direct admission to the hospital.

[8] As *Danforth* indicates, the practical availability of safe alternatives is a consideration in determining the rationality of a prohibition on particular methods. Where the state has forbidden relatively safe method on the rationale that equally safe or safer methods are

(Continued on next page)

woman's options. It may also put some private parties in a position where they may impose regulations or costs that restrict the options of some women. But if the statute is reasonably related to health, the fact that private entities (i. e., the hospitals) impose additional requirements without the State's sanction or insistence cannot affect the statute's constitutionality.[9] We reject the district court's alternative ground for finding section 188.025 unconstitutional.

Footnote continued
available, the court must consider the actual availability of these alternatives. Practical obstacles, such as a consent requirement, may enter into this evaluation. However, the inquiry remains whether the regulation is one reasonably related to the women's health.

[9] "Our cases state 'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.' *Adickes* [v. *S.H. Kress & Co.*,] 398 U.S. [144,] 170, [90 S.Ct. 1598, 1615, 26 L.Ed.2d 142] [(1970)]. This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164, 98 S.Ct. 1729, 1737, 56 L.Ed.2d 185 (1978).

If it is true that no hospitals in Missouri will admit minor women without parental consent, and we agree the evidence is not convincing in this respect, the plaintiffs may wish to direct their attention to the actions of the hospitals. We express no view on the merits of this argument, but insofar as particular hospitals have characteristics which render their actions "state action", parental consent requirements arguably violate *Danforths* prohibition against an absolute parental veto. *Cf. Nyberg* v. *City of Virginia*, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974) (unconstitutional for public hospital to refuse facilities to perform elective abortions); *Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976); *Wolfe* v. *Schroering*, 541 F.2d 523, 527 (6th Cir. 1976); *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975); *Doe* v. *Hale Hospital*, 500 F.2d 144 (1st Cir. 1974); *cert. denied*, 420 U.S. 907, 95 S.Ct. 825, 42 L.Ed.2d 837 (1975). *Poelker* v. *Doe*, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977), held that a city operating a municipal hospital need not provide publicly financed hospital services for abortions for indigent women. It does not hold that a state hospital may refuse to allow physicians to perform paid abortions in the hospital, which was the issue in *Nyberg*.

B. Effect on Availability of Second Trimester Abortions.

The district court held that the hospitalization requirement unconstitutionally restricted the availability of second trimester abortions. We conclude that it is not clear that the district court applied the proper legal standard or that the factual findings underlying this holding are adequate. A remand for further proceedings is necessary to provide us with an adequate basis for review of the constitutionality of the hospitalization requirement.

[3, 4] In 1973 *Roe* v. *Wade* addressed whether a second trimester hospitalization requirement is a permissible regulation:

> Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, *whether it must be a hospital or may be a clinic or some other place of less-than-hospital status;* as to the licensing of the facility; and the like.

410 U.S. at 163, 93 S.Ct. at 732 (emphasis added).

See also Gary-Northwest Indiana Woman's Services v. *Bowen*, 496 F.Supp. 894 (N.D. Ind. 1980), *aff'd sub nom. Gary-Northwest Indiana Women's Services* v. *Orr*, ___ U.S. ___, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981).

Missouri argues *Roe* is dispositive here. On the basis of the record and contentions of the parties we deem the issue not so easily resolved. In 1973, when *Roe* was written D&E was not a well-known and common means of performing second trimester abortions. The record demonstrates that today D&E is the most often utilized and safest procedure for second trimester abortion up to 15 weeks.

483 F.Supp. at 685 n.9, & 686 n.13. Yet the district court found that D&E is not generally available to women seeking abortions in Missouri hospitals.[10] It was on this basis the district court found the hospitalization requirement invalid. We perceive the settled standard in reviewing state regulation of abortion rights of the mother to be (1) whether the state requirement imposes a substantial interference and burden on the woman's decision to have an abortion and if so (2) whether the state has shown a compelling basis for the law, that is, that the burden is not undue or unjustifiable. *See Charles* v. *Carey*, 627 F.2d 772 (7th Cir. 1980). In applying the strict scrutiny test, it, of course, must be acknowledged that the state has a compelling interest in the health of the mother and may regulate abortion "in ways that are reasonably related to maternal health." 410 U.S. at 164, 93 S.Ct. at 732.

We view the findings of the district court on this basis.

The conclusion of the district court that second trimester D&E is available in only one hospital in Missouri rests on a thin reed. The conclusion is based solely on the personal knowledge of two physicians, neither one of whom testified that he was familiar with the policies of the hospitals throughout the state[11]. Second, although the record suggests that hospitalized D&Es, when available, are more expensive than nonhospitalized D&Es and that the overall effect of the hospitalization requirement has been to substantially reduce the number of second trimester abortions

---

[10] The record does not make clear why D&E is not readily available for hospitalized second trimester abortions.

[11] Dr. Palmer was asked "Are you familiar with any hospital within the St. Louis metropolitan area that performs D&E second trimester procedures?" A. "No." (T. 135). Dr. Kassar was asked "Do you know of any other hospital in the State of Missouri which allows the use of dilation and evacuation in the second trimester?" A. "Not to my knowledge." (T. 257).

in Missouri, the district court made no findings. We think it essential the district court evaluate this overall testimony and make findings in this regard. We think it likewise essential that the record should be factually supplemented as to the availability or nonavailability of D&E procedures in hospitals throughout the state.

[5] From these factual conclusions the district court must then determine whether or not the hospitalization requirement imposes a substantial interference and burden on the woman's decision to have an abortion. Perhaps one can assume that it is implicit in the district court's opinion that mandated second trimester hospitalization limits the accessibility of abortion in Missouri, but based on the court's analysis it is not clear whether the correct legal standard was applied. We think it fundamental that the district court explicitly address the threshold question: Whether the hospital regulation directly interferes with the woman's decision to terminate her pregnancy. Assuming the district court, based on the evidence, answers this question in the affirmative, then the regulation comes under the strict scrutiny standard and the State has the burden to justify the regulation by demonstrating a compelling state interest.

In this regard, the district court properly considered the Supreme Court's previous evaluation of second trimester abortion regulations in *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 75-79, 96 S.Ct. 2831, 2843—2846, 49 L.Ed.2d 788 (1976). The Court found that the saline amniocentesis method, prohibited by a Missouri statute, was the most prevalent second trimester method and that supposedly safe alternatives (i. e., prostaglandins) were not readily available. Under these circumstances, the Court concluded that the prohibition against saline was not reasonably related to the woman's health since it prevented

use of a method that was safer for the woman than the available alternatives.

If the district court finds the hospital requirement constitutes a direct interference with the woman's decision to have an abortion the court must then determine whether Missouri's requirement reasonably relates to the protection of the woman's health. The State, in meeting this burden, must show that nonhospitalized D&E can reasonably be considered more dangerous than hospital procedures, including hospitalized D&E. It must also show that the methods that it argues are as safe or safer than nonhospitalized D&E are actually available to Missouri women. *Cf. Planned Parenthood* v. *Danforth,* 428 U.S. at 77 & n.12, 96 S.Ct. at 2845 & n.12 (burden on state to show availability). Missouri cannot "force a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *id.* at 79, 96, S.Ct. at 2845.

From this discussion it is clear that the central issue is the relative safety of nonhospitalized D&E and hospitalized methods. The record contains conflicting testimony about safety. Experts called by Planned Parenthood claim nonhospitalized D&E is *safer* than all hospitalized procedures, because hospitals create greater risks of infection, cause greater anxiety, and use general anesthesia. They also point to recent standards issued by the American Public Health Association and the American College of Obstetricians and Gynecologists, retracting their previous recommendation for hospitalization for second trimester abortions. On the other hand, the State's witnesses claim that hospitalization is essential because of the increased risks in the second trimester. The district court made no finding as to the relative safety of nonhospitalized and

hospitalized methods.[12] On remand, if the district court determines that the hospital requirement imposes a substantial interference and burden on the woman's decision to have an abortion then the court should make explicit findings as to the safety of nonhospitalized D&E compared to hospitalized methods.

---

[12] The district court stated:

On the record before it, this Court is convinced that aside from the question whether it is performed in a hospital or in an out-patient clinic,[12] dilatation and evacuation is the safest of the presently available post-twelve week abortion techniques.[13]

---

[12] Dr. Bernard Nathanson, one of defendants' experts, testified that the mortality (sic) and morbidity rates for D&E procedures performed outside a hospital were probably no different than those performed in hospital.

[13] Mortality rates (per 100,000 cases) for post-12 week abortion techniques for the years 1972–1977 are as follows:

D & E	8.3
Prostaglandins and other agents	10.8
Saline instillation	15.5
Hysterotomy and hysterectomy	45.3

Center for Disease Control, U. S. Dep't. of H. E. W., *Abortion Surveillance 1977*, Table 23.
483 F.Supp. at 686.

The quoted sentence from the text of the district court's opinion is ambiguous. It can be read as saying that it is not necessary to decide whether D&E is safer in a hospital or outside a hospital and that it suffices to say that if you average the mortality from D&E in hospitals and outside hospitals, D&E is safer than other methods. It can also be read as saying that D&E is equally safe in a hospital or outside a hospital, and that the D&E safety rate exceeds all other methods. The first reading would be an inadequate finding, since to invalidate a hospitalization requirement we must know the safety effects of hospitalization. General conclusions which average the two safety rates do not answer that question.

The footnotes do not resolve the ambiguity. The court refers to Dr. Nathanson's testimony that D&E is probably equally safe in a hospital or outside a hospital, but there is no finding to that effect. In footnote 13, the court refers to a study concluding that the mortality rate for

(Continued on next page)

In sum, we find that the district court failed to properly analyze the hospitalization requirement. On remand, it should first determine if the regulation creates substantial interference with and imposes a direct burden on the woman's decision to have an abortion. If it does, the district court should evaluate whether the hospitalization requirement is justified by a compelling state interest; i. e., whether it is reasonably related to the woman's health. Missouri bears the burden of justifying the restriction. We therefore vacate the district court's finding that Missouri's hospitalization requirement is unconstitutional. We remand this question back to the district court to take additional evidence, if deemed necessary by the parties or by the court, and to make additional findings in accord with this opinion. We respectfully request the district court to certify the record and its findings back to this court within 90 days.

II. *Parental or Court Consent For Minors.*

Section 188.028 prohibits abortions for women under 18 unless parental or court consent is obtained. The district court declared this section unconstitutional. In *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court declared that a state requirement that all minors obtain parental consent prior to

---

Footnote continued

D&E is lower than the mortality rate for other methods. These statistics do not distinguish between hospitalized D&E and nonhospitalized D&E, so there is no way to determine from them whether a nonhospitalized D&E is significantly safer than the other available methods.

Planned Parenthood argues that the record supports a finding that nonhospitalized D&E is as safe or safer than hospitalized D&E. It is true that several physicians testified to that effect. However there were also expert witnesses who disagreed. Since there are apparently no statistics that distinguish between hospitalized and nonhospitalized procedures, the conclusion depends upon an evaluation of the relative weight to be given the testimony of the experts. We decline to make a finding from the cold record where it depends on the credibility of the experts, a question uniquely within the province of the district court.

obtaining an abortion was unconstitutional. In *Bellotti* v. *Baird* (Bellotti II), 433 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), four justices concluded that the Massachusetts statute requiring judicial approval in lieu of parental consent was unconstitutional in part because it allowed a court to deny permission based on its perception of the woman's "best interests", even when a minor was mature enough to make her own decision. These four justices (Powell, Burger, Rehnquist and Stewart) described a procedure that would satisfy constitutional requirements:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth. Ibid.*

443 U.S. at 643—44, 99 S.Ct. at 3048—49 (footnote omitted).

The Missouri procedure found in subsection 188.028.2 (4) provides:

> (4) In the decree, the court shall for good cause:
>
> (a) Grant the petition for majority rights for the purpose of consenting to the abortion; or
>
> (b) Find the abortion to be in the best interests

of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied.

The district court concluded that the statute was invalid because in (c) it allows the state court unbridled discretion to "deny the petition, setting forth the grounds on which the petition is denied," limited only by the requirement that the court has "good cause." 483 F.Supp. at 687—90.

[6] We would agree if the statute provides discretion to deny permission to a minor for *any* good cause it would violate the principles set forth in *Danforth* and *Bellotti II*. We believe, however, that in the context of the statutory language, a denial of the petition would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests. These findings and the ultimate denial of the petition must be supported by a showing of "good cause". When the statute is so interpreted and applied it obviates Planned Parenthood's objections. Under these circumstances we find the judicial consent provision of the Missouri statute constitutional.

In view of the district court's finding that the judicial approval procedure was invalid the district court did not address Planned Parenthood's other objections to section 188.028. In the interest of judicial economy we do so now. First, Planned Parenthood points out that subsection 188.028.2(2) requires notice to all parents. It is argued that this is unconstitutional, relying on a statement in Justice Powell's opinion in *Bellotti II:*

[E]very minor must have the opportunity—if she so desires—to go directly to court without first consulting or notifying her parents. If she satisfies the court

> that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.

443 U.S. at 647, 99 S.Ct. at 3050.

The Supreme Court recently addressed this issue further in *H. L.* v. *Matheson*, ____ U.S. ____, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1-981). The Utah statute challenged in *Matheson* required the physician to "notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married." Utah Code Ann. § 76—7—304(2). *Matheson* holds that the state may require that notice be given to the parents of a minor who is living with and dependent upon her parents, is not emancipated by marriage or otherwise, and has made no claim or showing as to her maturity or her relations with her parents. *See* 101 S.Ct. at 1170. The Court narrowed its decision to these facts because the plaintiff "did not allege or proffer any evidence that either she or any member of her class is mature and emancipated." *Id.* at 1169.

Matheson establishes that the parental notice requirement in section 188.028 would be constitutional for minors like the plaintiff in that case. Our inquiry does not stop there, however. The standing of plaintiffs in this case is quite different from that of H. L. Here, plaintiffs are corporations and physicians who seek to provide abortion services. The complaint says that Planned Parenthood and Reproductive Health serve a patient population comprised of 36.5% and 16% of persons under 18, respectively. Plaintiffs have established that some of their patients include minors who are mature enough to make an abortion decision ("mature minors") or minors for whom an abortion without parental consultation is in their best interest

("best interests)) minors). Although the complaint makes no specific claim in this respect, testimony of several plaintiffs indicates a desire to perform abortions for such individuals.[13] In general, these physicians agreed that notice requirements are a burden on availability of services, interfere with the doctor-patient relationship, and do not serve the best interests of the patients. In sum, the record makes it clear that these physicians deal with minors who they consider mature enough to make a decision without parental involvement, or for whom parental involvement is not in their best interests.

[7] We are thus faced with the question left open in *Matheson:* whether it is constitutionally permissible to require mature or "best interests" minors to notify their parents prior to a court hearing in which they seek judicial consent for an abortion. We have no need to analyze this problem at length, as the justices of the Supreme Court have already explored it. As noted, in *Bellotti* II, Justice Powell's opinion advances persuasive reasons for concluding that parental notice is unduly burdensome in cases involving mature or "best interests" minors. 443 U.S. at 642-48, 99 S.Ct. at 3047-51. In *H. L.* v. *Matheson,* Justices Powell and Stewart concurred in the decision, but insisted that "a State may not validly require notice to parents

---

[13] *See* Widdicombe (Reproductive Health's Director) (T. 30-36, 74-78) (Reproductive Health identifies mature minors through screening process; some minors show greater maturity than persons of higher age); Palmer (T. 133-37) (some minor patients in his practice capable of giving informed consent without parental consent); Kassar (T. 216-19) (ability to give informed consent depends on factors other than age); Crist (T. 350-52) (presently provides abortions to women under 18 without parental involvement; believes many such women are capable of consent; cites example of "best interests" exception based on statistics showing 50% of those 12 years old and under who seek abortions are incest victims); Vera (T. 444-47) (psychiatrist who counsels women with unwanted pregnancies; personal experience includes instances where parental involvement has adverse effects).

in all cases, without providing an independent decision-maker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests." 101 S.Ct. at 1176—77. Justices Marshall, Brennan and Blackmun concluded that the Utah statute, which is very similar to the Missouri statute, is unconstitutional on its fact because the burdens it imposes exceed any identifiable state interests. *Id.* at 1184-94. The analysis in these opinions strongly suggests that subsection 188.028.2(2) is unconstitutional because it requires mature or "best interests" minors to give notice to their parents prior to the court hearing.[14] We so hold. *See also Wynn* v. *Carey,* 582 F.2d 1375, 1388 (7th Cir. 1978).

[8] Planned Parenthood also argues that several other features of section 188.028 are unconstitutional. They claim that the statute's supposed purpose of facilitating parental consultation is undermined by its overinclusiveness and underinclusiveness. They argue it is overinclusive because it requires the involvement of the parents of unemancipated minors who have been widowed or divorced and they argue that the statute is underinclusive because it does not require involvement of the parents of emancipated minors "regardless of their age, maturity, intelligence, education or experience. . . ." While we acknowledge that the classification may not be perfect, we conclude emancipation is a sufficiently accurate indicia of dependence on parental advice to serve as the basis for a legislative judgment by the Missouri legislature.

Nonetheless, Planned Parenthood claims that "emancipated" is excessively vague. They refer to confusion among various witnesses about the meaning of the term.

---

[14] Subsection 188.028.2(2) is severable from the remainder of the statute, so our holding does not affect the remainder of section 188.028.

As will be more fully developed later in this opinion, we conclude that to conduct a criminal prosecution under this statute there must be proof of scienter as to the elements of the crime. A successful prosecution would require proof that the physician performing the abortion knew that a minor who received an abortion under subsection 188.028.1 (2) was not "emancipated." Although the presence of a scienter requirement will not entirely eliminate problems caused by vagueness, we are satisfied it is sufficient here.[15] *See Colautti* v. *Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 685-86, 58 L.Ed.2d 596 (1979).

[9] Planned Parenthood also claims that the statute does not assure that the procedure will be anonymous and expeditious.[16] We are satisfied that anonymity is sufficiently protected by these procedures, which do not require the minor to disclose her name. Furthermore, the statute sets forth reasonable time requirements for court action on the petition. Although the statute does no more than direct the Missouri Supreme Court to promulgate rules for expedited appellate review, we are confident the Missouri Supreme Court will exercise its jurisdiction in a manner that recognizes the serious damages caused by delay.

We find the judicial consent provision under section 188.028 to be constitutional. We agree with Planned Parenthood, however, that the notice provisions found in subsection 188.028.2(2) are impermissible and must be set aside.

---

[15] We note that the Missouri Supreme Court has considered the proof necessary to show emancipation in the context of parental tort liability. *See Wurth* v. *Wurth*, 322 S.W.2d 745, 746 (1959).

[16] The delay argument is based in part on the 48 hours of additional delay required by section 188.039. Since we conclude that it is unconstitutional to require a 48-hour delay, the potential for delay is reduced. See Part IV A, *infra*.

II. *Restrictions on Abortion after Viability.*

[10] The district court held that subsection 188.030.1 is unconstitutional because it allegedly imposes criminal liability for an erroneous but good faith determination that a fetus is nonviable. The district court also found subsections 188.030.2 and 188.030.3 unconstitutional on similar grounds. Further, subsection 188.030.2 was held unconstitutionally vague, and subsection 188.030.3's requirement of a second physician was held to be overbroad because it requires a second physician even when there is no reasonable chance of fetal survival.[17]

A. *Subsection 188.030.1: Mental Culpability Requirement*[18]

---

[17] Missouri argues that none of the plaintiffs had standing to challenge section 188.030. The state relies on interrogatories submitted by the plaintiffs in which they said their abortion practices were limited to nonviable fetuses. However, at trial Dr. Kassar testified that he had once conducted an abortion at approximately 28 weeks, which is within the period of viability identified in *Roe* v. *Wade*. The district court found that this testimony established that "[e]nforcement of section 188.030 would have an immediate and direct effect on the medical practice of Dr. Kassar." In *Doe* v. *Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 62, 96 S.Ct. 2831, 2837, 49 L.Ed.2d 788 (1976), the Court recognized the standing of plaintiff physicians, since "[t]he physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions." *Doe* v. *Bolton*, 410 U.S. at 188, 93 S.Ct. at 745. Since Dr. Kassar's credibility was a matter for the district court to resolve, and the district court accepted his testimony, he has standing. It is therefore unnecessary to determine whether other plaintiffs may also have standing.

[18] Subsection 188.030.1 reads:

> No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman. Before a physician may perform an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to pre-

(Continued on next page)

The district court based its holding that the State unconstitutionally imposed criminal liability without fault on *Colautti* v. *Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979).

In *Colautti* the Supreme Court said the Pennsylvania statute was unduly vague and that the vagueness was "compounded" by the fact the statute subjected a physician to liability without fault. The Court agreed that the Pennsylvania criminal code[19] required scienter as to "whether the physician's actions will result in the death of the fetus." *Id.* at 394, 99 S.Ct. at 685. However, it did not contain a requirement "that the physician be culpable in failing to find sufficient reason to believe that the fetus may be viable." *Id.* at 394-95, 99 S.Ct. at 685-86.

The district court acknowledge that subsection 188.030.1 does not have the vagueness problems encountered with the Pennsylvania law. However, it found that the Missouri law lacks a culpability requirement, and found that this alone rendered the statute unconstitutional. 483 F.Supp. at 692. Without a culpability requirement, the Missouri statute would create a "profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment." 439 U.S. at 396, 99 S.Ct. at 686.

Footnote continued

serve the life or health of the woman and shall further certify in writing the medical indications for such abortion and the probable health consequences.

Mo.Ann.Stat. § 188.030.1 (Vernon).

[19] The Pennsylvania Act provided that a person who failed to make a viability determination or to exercise the prescribed standard of care was "subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." Pa.Stat.Ann., Tit. 35, § 6605(a) (Purdon 1977). Criminal sanctions, if any, would be imposed under the separate Pennsylvania law of criminal homicide.

Missouri claims section 188.075 requires culpability as to viability:[20]

> Any person who contrary to the provisions of sections 188.010 to 188.085 *knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action* required by sections 188.010 to 188.085 shall be guilty of a class A misdemeanor and, upon conviction, shall be punished as provided by law.

Mo.Ann.Stat. § 188.075 (Vernon) (emphasis added).

The district court acknowledged that section 188.075 requires a culpable mental state, but decided that like the Pennsylvania law in *Colautti*, it reaches only the act of abortion and not the viability determination.

We respectfully disagree with the district court's interpretation of the Missouri law. To violate section 188.075, one must do more than knowingly perform an abortion—one must knowingly perform an abortion that is contrary to subsection 188.030.1. Since the only abortions contrary to subsection 188.030.1 are abortions on viable unborn children, a physician could not knowingly perform an abortion contrary to subsection 188.030.1 unless he *knew* the child was viable. A good faith determination of nonviability would be a defense.

[11] This interpretation can also be reached by assum-

---

[20] In the district court Missouri argued that the court should abstain and permit the state courts to construe this statute. Missouri has not argued for abstention on this appeal. We realize that "it would appear that abstention may be raised by the court *sua sponte*." *Bellotti* v. *Baird*, 428 U.S. 132, 144 n.10, 96 S.Ct. 2857, 2864 n.10, 49 L.Ed.2d 844 (1976). Nonetheless, we see no reason to abstain here, since we find that the language of the Missouri statute clearly withstands the objections raised by Planned Parenthood. Furthermore, we note that Missouri has no certification procedure whereby this court can refer questions of state statutory construction to the state supreme court *Cf. id.* at 150-51, 96 S.Ct. at 2867-68.

ing that by using "knowingly" as it did, the Missouri legislature intended to describe the mental state required for all the crimes governed by section 188.075. However, because of the breadth of the activity covered by this penalty statute, the legislature was not precise as to the application of the mental state requirement to particular elements. Missouri has enacted, a statute to copy with this exact situation:

> If the definition of an offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

Mo.Ann.Stat. § 562.021 (Vernon) (effective Jan. 1, 1979).

In this case, section 188.075 prescribes "knowingly" as the mental state, and Missouri statutes further define "knowingly":

> A person *"acts knowingly"*, or with knowledge,
>
> (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
>
> (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

Mo.Ann.Stat. § 562.016.3 (Vernon).

As applied to the elements of this crime, the State would be required to prove that the physician was (1) aware he was performing an abortion; (2) aware this was a viable unborn child; and (3) aware the abortion was not necessary to preserve the life or health of the woman. When interpreted in this fashion, the statute does not impermissibly impinge on the rights of women and their physicians. It

can be used to punish only those physicians who *know* that a fetus is viable and that the abortion is not necessary to the life and health of the woman. Such regulation is clearly permissible under *Roe*.

B. *Subsection 188.030.2.*

[12] The district court next considered subsection 188.030.2.[21] The court first found this section void for failure to require a culpable mental state. We again disagree with this interpretation; we conclude that the Missouri statutes require the State to prove culpability for the elements of this crime, just as they require proof under subsection 188.030.1. The State would have to prove, beyond a reasonable doubt: (1) that the doctor knew the child was viable; (2) that he knew the method he chose was not the available method most likely to preserve the life and health of the unborn child; and (3) that he knew the method he used was less or equally dangerous to the life and health of the woman than the available method most likely to preserve the life and health of the unborn child.

The district court also struck down this section of the Missouri law for unconstitutional vagueness. The court focused on the portion stating that the physician "may" use another technique when the technique that would be

---

[21] Subsection 188.032.2 reads:

> Any physician who performs an abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of woman than another available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs an abortion upon a viable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

Mo.Ann.Stat. § 188.030.2 (Vernon).

safest for the fetus presents "a greater risk to the life and health of the woman" than an available alternative.

In *Colautti*, one of the criticisms of the Pennsylvania statute was that the choice of method to be utilized turned on whether an alternative was "necessary". 439 U.S. at 397-401, 99 S.Ct. at 686-689. The Missouri statute does not use this term. Instead, the choice of method turns on a direct balance of risk. If the risk to the woman from the "fetal survival method"[22] is *greater than* the risk to her from alternative methods, the physician *may* choose an alternative. Implicitly, if the risk to the woman from the fetal survival method is *less than or equal to* the risk to her from available alternative methods, the physician *must* use the fetal survival method. Given the precision of this balance, the question is not whether the statute is vague, but whether the woman's constitutional rights are violated by a requirement that a fetal survival method *must* be used whenever the risks to the woman with that method are less than or equal to the risk from other possible methods.[23]

---

[22] This term is used here to refer to "the available method most likely to preserve the life and health of the unborn child." Mo.Ann.Stat. § 188.030.2 (Vernon).

[23] The district court emphasized that the statute says the physician "*may*" use another technique, implying that this inserts impermissible vagueness. However, the effect of the word "may" in this provision is this: when the risk to the woman of a fetal survival method is greater than the risk of available alternative methods, the physician *may* choose whatever method he wishes. In other words, when the risk of the survival method is greater, the statute leaves the doctor's choice exactly as it would be without the existence of this statute: to choose the method he deems appropriate. While this means he may choose the method that is more dangerous to the woman and safer for the fetus, the physician could have made a similar decision prior to passage of this statute; hence, the statute does nothing to alter the rights of the woman and her physician. We are aware of no decisions that have required the state to pass legislation *requiring* physicians to choose a method most favorable to the woman's life and health.

[13, 14] The State has regulated post-viability abortions by requiring use of particular methods. This is clearly within the State's power, as long as it does not interfere with medical judgments as to the method necessary for the preservation of the life or health of the mother. *Roe* v. *Wade*, 410 U.S. at 164-65, 93 S.Ct. at 732-33. Thus, the Missouri statute is clearly constitutional in requiring use of a fetal survival method when the risks of that method to the woman are lower than alternatives. The only remaining question is whether the state can constitutionally require the use of the fetal survival method in cases where the risk is equal. By definition, if the risk is absolutely equal, the life and health of the mother are subjected to no greater risk by requiring use of the fetal survival method.[24] by requiring use of such a method when the risks from it are less than or equal to the risk of alternatives, Missouri is within permissible bounds of regulation.[25]

---

[24] In discussing the Pennsylvania statute in *Colautti*, the Court observed that the statute "does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict." 439 U.S. at 400, 99 S.Ct. at 688. This statement is in the context of a discussion of the vagueness of the statute, and merely rebuts a claim by Pennsylvania as to the specificity of the statute. *Colautti* did not hold that language of this nature is constitutionally required. Nor does it hold that a state may not require use of a method more likely to lead to fetal survival if the risks to the woman are equal. Even if this language were binding, by definition the woman's life and health and the fetus' life and health are not in "conflict" when the method favoring one's survival has no detriment to the chances of the other to survive.

[25] *Cf. Margaret S.* v. *Edwards*, 488 F.Supp. 181 (E.D.La. 1980). The court held that a Louisiana statute was unconstitutional. It provided:

> Any physician who shall perform or induce an abortion upon a pregnant woman where the presumption of viability exists shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child.

The court observed that this made no allowance for the life and health of the mother, as required by *Roe*. Here, of course, the statute allows the doctor to consider the life and health of the woman in choosing a method.

We have no disagreement with Planned Parenthood's argument that these are medical judgments that should not be second-guessed. However, if, as we have held, there is a culpability requirement, the State faces a stringent burden of proof as to the physician's actual knowledge of the viability of the child and the danger of the alternative methods. The State's power to regulate does not permit it to decide if a particular child is viable, or to choose a particular procedure, or to decide whether a procedure is necessary for the life and health of a particular woman. These decisions are left to physicians. The post-viability regulatory power does permit the State to criminalize abortions performed *after* a physician has made a judgment that a fetus is viable and the abortion or abortion method is not necessary for the life and health of the woman.

C. Second Doctor Requirement.

[15] The district court declared subsection 188.030.3[26] unconstitutional because of the lack of a culpability requirement. Again, we find that the Missouri statutes require culpability as to each material element of the crime.

The district court also had another reason for striking down this section: the second physician requirement

---

[26] Subsection 188.030.3 states:

> An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

Mo.Ann.Stat. 188.030.3 (Vernon).

is overbroad because it requires a second physician even when the fetus has no reasonable chance of survival. Thus, the requirement is an "undue burden" in at least some cases. *See Charles* v. *Carey*, 627 F.2d 772 (7th Cir. 1980).

Review of this holding requires review of the support for the two underlying factual conclusions: (1) that the second physician requirement is a burden and (2) that there is no possible justification for a second physician during a D&E.

1. **Burden on Decision.**

[16] Missouri does not deny that costs are increased by requiring a second physician, thereby restricting availability of the abortion.[27] Instead, Missouri argues that increased cost is not a direct burden. Missouri basis this argument on *Harris* v. *McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and other cases dealing with refusals by states or the federal government to make government funds available for abortions. *See also Williams* v. *Zbarz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980); *Maher* v. *Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). However, Missouri's argument is not supported by these cases, which focus on the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher* v. *Roe*, 432 U.S. at 475, 97 S.Ct. at 2383. The state's refusal to pay for abortions is said not to be a "direct interference" because it "places no governmental obstacle in the path of a

---

[27] *E. g.*, Kassar (T. 226) (burden because requires presence of pediatrician for up to 24 hours); Crist (T. 354-57) (costs are increased by second physician requirement; conclusory statement it interferes with doctor-patient relationship); Kretzschmar (T. 394-95) (requiring second physician significantly increases cost; interferes with doctor-patient relationship and burdens availability).

woman . . .", *Harris* v. *McRae*, 100 S.Ct. at 2687, that is, the regulation does not create the woman's lack of finances, but merely fails to remedy it. In contrast, a government-imposed regulation that adds to the cost of abortion is a government-created obstacle and is subject to strict scrutiny. If the rule was as Missouri claims, the state would be free to add on any costly requirements under the guise of regulation, and would not be required to justify these requirements by a compelling state interest.

It is apparent from even the conclusory testimony here that a second physician requirement would raise the cost of an abortion, thereby decreasing its availability and interfering with the decisions of some women to obtain abortions. Missouri did not challenge that proposition, and must justify its law with a compelling state interest.

2. *Justification for Second Physician During D&E.*

We move then to the argument that there is no possible justification for a second physician during a D&E procedure. Missouri claims there is no overbreadth in the second doctor requirement because doctors do not perform D&Es after viability. However, Dr. Crist testified (T. 427-29), with examples from his practice, that D&E may be the best medical practice at 28 weeks; he also testified that in the 60 days prior to his testimony he had done five post-24 week abortions by D&E. He chose this method because "there were absolutely contraindications to the use of hypertonic solutions or the use of prostaglandins, or the induction of labor." (T. 438).

[17, 18] Missouri points to testimony by other physicians that they do not or would not use D&E at these stages. However, this serves only to indicate that the question is one in which medical opinions and circumstances may differ. There is no error in the district court's

factual conclusion that for some patients and physicians, D&E is the method of choice even after viability is possible.[28]

The next question is whether the district court correctly concluded that a fetus cannot survive D&E. If the fetus could survive, the state may be able to require the presence of a second physician in furtherance of its compelling interest in the potential life of the fetus.

The D&E procedure is described in Tietze, Induced Abortion: 1979 (3d ed. 1979).

> When vaginal evacuation is performed in the second trimester, it typically involves use of a small forceps for the dismemberment and removal of the fetus, of a suction cannula for the aspiration of amniotic fluid and of placental and fetal debris, and of a surgical curette to ensure complete evacuation. To minimize the risk of laceration, laminaria is often used to dilate the cervix.

Id. at 68.

Several physicians said that dismemberment of the fetus is not always essential in a D&E procedure. However, Dr. Kassar indicated this was true of a smaller fetus; presumably, a viable fetus is larger. Several physicians testified that there was no chance a viable fetus would survive D&E.[29]

---

[28] We note that the choice of D&E after viability is subject to the requirements of subsection 188.030.2. Thus D&E is not to be used when the child is viable and other methods are available that are more likely to preserve its life and health, and those methods do not pose a greater risk to the life and health of the woman than another available method or technique.

[29] *E. g.* Crist (T. 355) ("no chance"); Kretzschmar (T. 393); Nathanson (T. 615) (D&E never results in a live birth); Schmidt (T

(Continued on next page)

Missouri relies solely on Dr. Crist's testimony. Dr. Crist's testimony on cross-examination contradicted in part his earlier testimony, and did not specifically refer to a fetus that had reached viability. It was also contradicted by the overwhelming weight of testimony of doctors testifying for both sides. These experts all agreed that when D&E is performed on a viable fetus there is no chance of survival, apparently because the fetus has reached a size where dismemberment is unavoidable. We conclude the district court's finding of fact as to the chances of survival is not clearly erroneous.

We agree with the district court that the second physician requirement is overbroad, and thus imposes a burden on women in cases where the burden is not justified by any possibility of survival of the fetus. We therefore affirm the district court's holding.[30]

IV. *"Informed Consent."*

Section 188.039 requires that the attending physician give a woman specific information prior to an abortion,

---

Footnote continued

836) (no reason for second physician when D&E is used on viable fetus; no possibility of survival); Martin deposition, Defendant's Exhibit Q at 76-77 (live birth after D&E "an impossibility"). *See also* Kassar, (T. 258) (during second trimester, fetus is usually of sufficient size that skull must be crushed for D&E; chance of fetal survival in this type of procedure is "nil").

[30] In *Margaret S. v. Edwards*, 488 F.Supp. 181 (E.D.La. 1980), the court discussed the constitutionality of a second physician requirement and concluded that such requirements were permissible, although the Louisiana statute imposed improper standards on the second physician. The court did not deal specifically with the D&E method, so its discussion was based on an evaluation of the chances of a live birth using any method. The court found that "the State can choose to be prepared for those rare instances when there is a live birth." *Id.* at 201. Nothing in this conclusion is in conflict with the result reached here. We do not reach the question of the state's right to require a second physician when there is some possibility the fetus may survive.

and requires that 48 hours lapse between giving the information and the abortion. It also requires that the woman sign a consent form acknowledging that she has been given the required information.

A. *48 Hour Wait.*

[19] The district court held that the 48 hour waiting requirement was unconstitutional, based on evidence that it increases delay, and delay increases the risk to the woman. Furthermore, it "requires that a woman make a minimum of two visits to her physician or to a clinic. This requirement involves additional time and expense and, for women living outside the metropolitan areas, may require additional travel or subsistence expense during the delay." 483 F.Supp. at 696. We affirm the ruling of this district court. *See Planned Parenthood League* v. *Bellotti*, 641 F.2d 1006, 1014-16 (1st Cir. 1981) (preliminary injunction against 24 hour wait); *Charles* v. *Carey*, 627 F.2d 772, 785-86 (7th Cir. 1980) (24 hours).[31]

B. *Notice to Parents of Minors.*

[20] Subsection 188.039.2 requires a minor to acknowledge that her parents have been given the information prescribed in section 188.039, and it forbids physicians to perform abortions unless the minor has so acknowledged. The district court held this provision unconstitutional on the grounds it was in contravention to the principles in

---

[31] These findings are very similar to the district court's findings on this issue in *Women's Services* v. *Thone*, 483 F.Supp. 1022 (D.Neb. 1979). Based on these findings, the district court in Women's Services held the requirement unconstitutional, and this court affirmed. 636 F.2d 206, 210 (8th Cir. 1980). However, the entire decision in *Women's Services* was remanded to this court to reconsider in light of its recent decision in *H. L.* v. *Matheson*, ____ U.S. ____, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981). *Matheson* recognizes time is likely to be of the essence in an abortion decision. The Utah statute did not provide a mandatory waiting period.

Bellotti II, discussed in Part II, *supra*. On the basis of our discussion of *Bellotti II* and *H. L.* v. *Matheson* in Part II, *supra*, we agree that this requirement is also unconstitutional because it requires parental notice even when the minor is mature or emancipated or the abortion is in her best interests, and a court has made findings to that effect.

C. *"Probable Physiological and Anatomical Characteristics of the Unborn Child" and "Physical Danger . . . and Psychological Trauma".*

Subsection 188.039.2(3) requires the woman to acknowledge that she has been informed of "[t]he probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed." Subsection 188.039.2(4) says she must be informed of "[t]he immediate and long-term physicial dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and stillbirths following abortion." The district court held these provisions unconstitutional. 483 F.Supp. at 698-99.

The Supreme Court allows the state to require "informed consent", even in the first trimester. *See Planned Parenthood* v. *Danforth*, 428 U.S. at 64-67, 96 S.Ct. at 2838-2840. Based upon that decision, courts have sustained various provisions designed to insure that the woman has made an informed consent. *See e.g., Wolfe* v. *Schroering*, 541 F.2d 523, 526 (6th Cir. 1976); *Planned Parenthood Association* v. *Fitzpatrick*, 401 F.Supp. 554, 587 (E.D.Pa. 1975), *aff'd*, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed.2d 1205 (1976). *Cf. Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1017-18 (state may require use of a special form if physician is not required to read it or have it signed

in office, or discuss it with the woman, and when physician may give any additional information).

Nonetheless, *Danforth* recognized that there are limits to what the state may require. The Court construed "informed consent" to mean:

> [T]he giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

428 U.S. at 67 n.8, 96 S.Ct. at 2840 n.8.

The Court explained this further in *Whalen* v. *Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977):

> The constitutional right vindicated in *Doe* [v. *Bolton*, 410 U.S. 179, [93 S.Ct. 739, 35 L.Ed.2d 201] (1973)] was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.

Id. 429 U.S. at 605 n.33, 97 S.Ct. at 879 n.33.

Other abortion decisions emphasize the importance of the doctor/patient relationship to the abortion decision. *See, e. g., Roe* v. *Wade*, 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35

L.Ed.2d 147 (1973); *Doe* v. *Bolton*, 410 U.S. 179, 196-97, 93 S.Ct. 739, 749-50, 35 L.Ed.2d 201 (1973); *Colautti* v. *Franklin*, 439 U.S. 379, 387-88, 99 S.Ct. 675, 681-82, 58 L.Ed.2d 596 (1979).

[21] In this context, we conclude that the state may not infringe on the *woman's* right to consult with a physician whose judgment and advice on the abortion decision has not been dictated by the state. Such a practice by the state may prevent the woman and the doctor from freely making the judgments left to them by *Roe* and subsequent decisions.

With this principle in mind, numerous courts have declared statutes unconstitutional which require physicians to give patients information contrary to their best judgment or medical opinions. *See Freiman* v. *Ashcroft*, 584 F.2d 247 (8th Cir. 1978), *aff'd*, 440 U.S. 941, 99 S.Ct. 1416, 59 L.Ed.2d 630 (1979); *Charles* v. *Carey*, 627 F.2d 772, 783-84 (7th Cir. 1980).[32] Most recently the First Circuit granted a preliminary injunction against a Massachusetts statute requiring "a description of the stage of development of the unborn child." The court found that information was immaterial to medically relevant considerations, and caused emotional distress. It also observed that many women did not want the information and their doctors considered it bad medical practice to force it on them. *Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1021-23.

[22] We agree with the analysis in these cases, and the findings of the district court support similar conclusions

---

[32] *See also Leigh* v. *Olson*, 497 F.Supp. 1340 (D.N.D. 1980); *Margaret S.* v. *Edwards*, 488 F.Supp. 181, 210-11 (E.D.La. 1980); *Akron Center for Reproductive Health* v. *City of Akron*, 479 F.Supp. 1172, 1203 (N.D.Ohio 1979); *Wynn* v. *Scott*, 449 F.Supp. 1302, 1316-17 (N.D.Ill.), *appeal dismissed*, 439 U.S. 8, 99 S.Ct. 49, 58 L.Ed.2d 7 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979).

here. The district court found that the "anatomical characteristics" and "physical dangers" information "interfere[s] with the right of a woman to consult with her physician regarding abortion free from state interference." 438 F.Supp. at 698. On the basis of repeated testimony it found that some physicians do not believe this information is in the best health interests of their patients, and that it may increase the risks from abortion by increasing the patient's anxiety and tension. Furthermore, some physicians testified they do not believe there are any long-term physical or psychological effects of abortion, or are unaware of such effects. Thus, "such physicians, in the exercise of their best medical judgment, would choose not to provide their patients seeking abortions with [the information]." *Id.* these findings demonstrate that there is a burden on the woman's decision: she is deprived of the freedom to make a decision in reliance on information provided by her physician based upon the physician's best medical judgment. Furthermore, the woman's decision is burdened insofar as the anxiety and tension involved in such a decision are increased without medical justification. There is no rational reason, much less a compelling state interest, that justifies forcing physicians to give women information that the physicians consider injurious to the woman's health or simply untrue. *See Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1021-22. We affirm the district court's holding that subsections 188.039.2(3) and 188.039.2(4) are unconstitutional.

D. *Pregnancy and Time Elapsed Since Conception.*

Subsections 188.039.2(1) and 188.039.2(2) require the physician to tell the woman that in the physician's best medical judgment the woman is pregnant and the number of weeks elapsed since the probable time of conception. The district court found these requirements unconstitutional because they would prevent the procedure known as "men-

strual extraction." Dr. Crist described this procedure as follows:

> Menstrual extraction, endometrical aspiration, and menstrual induction are all synonomous terms for aspiration or removal of uterine contents prior to the time that a classic urinary pregnancy test would turn positive, and that would be roughly four weeks after conception or 42 days after the last menstrual period.

T. 364-65.

The district court concluded that the physician cannot determine at this stage whether the woman is in fact pregnant. If a physician desired to perform this procedure with intent to cause an abortion, this statute would present the procedure because it would be impossible for the physician to give the woman the required information.

Missouri does not claim that a prohibition against menstrual extraction is constitutional, but argues here that the statute does not affect menstrual extraction because a menstrual extraction is not an abortion.[33] As the district court noted, Dr. Crist testified that it is a reasonable medical certainty that 85% of women with a menstrual period 10 days late are pregnant. Given this probability, it is entirely possible that a physician would perform the procedure with intent to terminate a pregnancy. During cross-examination, Dr. Palmer testified:

> Q. Have you ever performed a menstrual extraction intending to terminate the life of a fetus in his or her mother's womb?

---

[33] Abortion is defined under Missouri law as "the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child." Mo.Ann.Stat. § 188.015(1) (Vernon).

A. The intention of a menstrual extraction is either to correct a menstrual problem, which would would be a mini-D&C, or if the patient is pregnant and can't detect it, it is an abortion.

So the answer to your question is yes. T. 193.

[23] The district court found that the present statutory language would prevent physicians from performing menstrual extractions since it is impossible to be certain that the woman is pregnant. We agree. Since there is no justification for such a prohibition, subsections 188.039.2(1) and (2) were properly declared unconstitutional.

E. *Attending Physician Must Give the Information.*

Section 188.039.1 requires that the "attending physician" inform the woman of the information described in subsection 188.039.2. The district court said this requirement is constitutional.

Planned Parenthood argues that the information can be given by non-physicians and that requiring physicians to give the information creates scheduling problems, delays, and high costs. They base this in part on their claim that "attending physician" refers to the same doctor who performs the operation.

[24] The delay and scheduling problems are not significant without the 48-hour waiting period. Similarly, the claims of higher cost and delay due to forcing a physician to spend up to an hour and a half giving this information have been undercut since the court has held several of these information requirements unconstitutional. The portions of subsection 188.039.2 that are not unconstitutional merely require the attending physician to inform the woman of the particular risks associated with the abortic technique to be used, and alternatives to abortion. The district court properly concluded that this minimal requirement is con-

sistent with the principle that the abortion decision is one to be made by a woman and her physician,[34] and advances the state's interest in insuring that the decision is made with "full knowledge of its nature and consequences." *Planned Parenthood* v. *Danforth*, 428 U.S. at 67, 96 S.Ct. at 2840. *See Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172, 1204 (N.D.Ohio 1979); *Women's Community Health Center* v. *Cohen*, 477 F.Supp. 542, 550 (D.Me. 1979).

V. *Pathology Reports.*

Section 188.047 requires:

> A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

Mo.Ann.Stat. § 188.047 (Vernon).

In upholding the constitutionality of this provision the court applied a rational basis test and found that

---

[34] Planned Parenthood emphasizes the problems raised by requiring that the same doctor give the information and perform the operation. It is by no means clear that the statute requires this. Subsection 188.039.1 says *no physician* shall perform an abortion unless *the attending physician* gave the required information. Subsection 188.039.2, which describes the information, refers exclusively to "the attending physician". Although it is not necessary to our holding, one could interpret this to mean that the *attending* physician must give the information, and that another physician may perform the operation. In contrast, in *Charles* v. *Carey*, the statute stated explicitly that the information must be given "by the physician who is to perform the abortion." 627 F.2d at 780 n.11. The court's declaration that this section was unconstitutional was based on the burdensomeness of this requirement.

the requirement was rationally related to the state's interest in the standards of medical care and was not an undue burden.

Planned Parenthood argues that this regulation burdens the woman's decision to obtain an abortion by increasing costs. The evidence showed this requirement would raise the cost of an abortion by $10 to $40.[35]

As we previously observed, *Harris* v. *McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and similar cases do not hold that imposition of additional costs cannot be a burden on the woman's decision. Section 188.047 applies to all abortions, including those performed in the first trimester. This court has previously discussed review of regulations imposed on those providing for trimester abortions:

> [T]he state has the power to insure that the first trimester abortions, like other medical procedures, are performed under conditions providing for the maximum safety of the patient. Statutory provisions which merely authorize the adoption of regulations, albeit during the first trimester, are not unconstitutional. *See Planned Parenthood Association* v. *Fitzpatrick*, 401 F.Supp. 554, 576 (E.D.Pa. 1975). . . .
>
> Any regulations promulgated under such enabling statutes must, of course, comply with the requirements of the Supreme Court. A state can impose the same regulations on a clinic, specifically built to perform abortions during the first trimester, that are imposed on other clinics that perform surgical procedures requiring approximately the same degree of skill and

---

[35] Judith Widdicombe, Executive Director of Reproductive Health, said the current cost of a first trimester abortion at Reproductive Health is $170, and estimated that this requirement would increase costs by $19.40/abortion (approximately 11.4%).

> care as the performance of first trimester abortions. As long as the regulations applying to abortion clinics are the same as those applied to other clinics performing similar surgical procedures, it would not be impermissible to make them specifically applicable to abortion clinics. *Where the state regulates abortions beyond its regulation of similar surgical procedures, that difference in treatment must be shown to be necessitated by the particular characteristics of the abortion procedure. See Word* v. *Poelker, supra* at 1351-52.

Hodgson v. *Lawson*, 542 F.2d 1350, 1357-58 (8th Cir. 1976) (emphasis added, footnote omitted).

There was uncontroverted testimony that Missouri does not require submission of tissue to a pathologist following other medical procedures. Thus, the difference in requirements must be justified by the particular characteristics of the abortion procedure. As the Seventh Circuit stated in *Friendship Medical Center* v. *Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975):

> [T]he state will bear a heavy burden . . . both with respect to showing the existence of a unique medical complication and with respect to showing that the problem is of such a nature as to be beyond the general scope of a doctor's professional judgment.[36]

---

[36] *See Planned Parenthod of Minnesota, Inc.* v. *Citizens for Community Action*, 588 F.2d 861 (8th Cir. 1977) (imposition of restrictive "zoning" ordinance on first trimester abortion facility); *Word* v. *Poelker*, 495 F.2d 1349 (8th Cir. 1974) (ordinance regulating first trimester abortion clinics). *See also Mahoning Women's Center* v. *Hunter*, 610 F.2d 456 (6th Cir. 1979), vacated and remanded, 447 U.S. 918, 100 S.Ct. 3006, 65 L.Ed.2d 1110 (1980) (ordinance requiring expensive equipment and supervision by experienced obstetrician); *Women's Medical Center of Providence, Inc.* v. *Cannon*, 463 F.Supp. 531 (D.R.I 1978) (requiring licensed physician with hospital privileges); *Florida Women's*

(Continued on next page)

Id. at 1154.

The issue here is not whether pathology reports are useful and even necessary in some cases. They clearly are. Testimony indicated that abnormalities in the tissue may warn of serious, possibly fatal disorders. Instead, the question here is whether Missouri has shown any reason why the physicians and medical facilities performing abortions cannot make medical judgments about the desirability of a pathology report in an individual case, while physicians and medical facilities performing all other types of surgery are free to exercise their professional judgment.

> No proof sufficient to explain this distinction was offered by the State. Missouri relied on testimony indicating that some physicians, including pathologists, believe that it is good medical practice to have a pathologist examine any tissue removed from the body. These physicians also expressed concern that in a close case, a pathologist may see something that the ordinary physician would not. We accept this testimony as true, but these justifications do not distinguish tissue obtained from abortion from that obtained in every other surgical procedure. In procedures other than abortion, some physicians may say that every tissue should be examined and that nonpathologist physicians may err in close cases; further, the consequences to the patient of error may be serious. Nevertheless, in procedures

---

Footnote continued

Medical Clinic, Inc. v. *Smith*, 478 F.Supl. 233 (S.D.Fla. 1979), *appeal dismissed*, 620 F.2d 297 (5th Cir. 1980) (various first trimester regulations unconstitutional, including pathologist requirement); *Arnold* v. *Sendak*, 416 F.Supp. 22 (N.D.Ind.), *aff'd*, 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976). *Cf. Baird* v. *Department of Public Health*, 599 F.2d 1098 (1st Cir. 1979) (abortion-neutral regulation of clinic licensing); *Abortion Coalition* v. *Michigan Department of Public Health*, 426 F.Supp. 471 (E.D.Mich. 1977).

other than abortion Missouri leaves it to the professional judgment of the physician to examine the tissue and decide whether a pathologist's examination and the additional costs it imposes are warranted. Physicians who perform abortions testified that they exercise their professional judgment. They routinely perform "gross" examinations of the tissue, and send it to the pathologist if their professional judgment so dictates.[37]

[25] In the absence of a more convincing justification for this distinction between first trimester abortion and other surgical procedures, we hold that the provision is unconstitutional.[38] We emphasize that this does not leave patients unprotected. Missouri law requires that all abortions be performed by physicians. As with any other surgical procedure, patients are protected by "the physician's medical judgment and professional, ethical standards and . . . city and state health regulations which have application to [medical] procedures in general." *Word* v. *Poelker,* 495 F.2d 1849, 1351 (8th Cir. 1974). Patients are also protected by legal remedies for negligence of medical personnel.

---

[37] A "gross" examination is one unaided by a microscope. Pathologists may perform a gross examination or a miscroscopic examination if they feel it is necessary. This statute does not specify which type of examination the pathologist is to perform. Dr. J. Chandler Smith, Chairman of the Pathology Department at the University of Missouri Medical School, testified that with respect to abortions, a non-pathologist physician is just as capable of performing an adequate gross examination as is a pathologist, and that the abnormalities which are of concern are readily identifiable.

[38] *Contra, Wynn* v. *Scott,* 449 F.Supp. 1302, 1322 (N.D.Ill.), *appeal dismissed,* 439 U.S. 8, 99 S.Ct. 49, 58 L.Ed.2d 7 (1978), *aff'd,* 599 F.2d 193 (7th Cir. 1979) (no burden on woman; plaintiff did not argue it burdened or discouraged patients).

VI. *Recordkeeping.*

Planned Parenthood challenges the constitutionality of subsection 188.052.2,[39] which deals with post-abortion care.

Planned Parenthod argues that many women will resist supplying the physician with the required information, particularly the time and place of the abortion. If the physician knowingly fails to complete the report, he or she is subject to criminal penalties. So, if a patient seeks the physician's services and refuses to give the required information, the physician can either treat her and risk criminal prosecution or refuse to care for her.

Neither the district court's opinion nor the Missouri defendants addressed this argument. In evaluating it, we observe that to subject this reporting requirement to strict scrutiny would be inappropriate here, as there are no suspect classifications and no fundamental rights at stake. Subsection two does not burden a woman's decision to seek an abortion, since it deals only with post-abortion care.[40] *See Whalen* v. *Roe*, 429 U.S. 589, 605 n.33, 97 S.Ct. 869, 879 n.33, 51 L.Ed.2d 64 (1977). Thus, this reporting requirement must only be rationally related to a constitutionally permissible purpose. Planned Parenthood is correct in arguing that the statute, on its face, does not state

---

[39] Subsection 188.052.2 provides:

> An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such post-abortion care. This report shall include:
>
> (1) The date of the abortion;
>
> (2) The name and address of the abortion facility or hospital where the abortion was performed;
>
> (3) The nature of the abortion complication diagnosed or treated.

Mo.Ann.Stat. § 188.052.2 (Vernon).

[40] It seems highly unlikely that a woman would forego a legal abortion for fear that in the event of complications she would have to tell a physician when and where she received the abortion.

a defense for the physician if the patient refuses to provide information. Apparently Missouri feels that obtaining this information is of such importance that it must threaten the physician with criminal prosecution so that he or she will, in turn, threaten the woman with refusal of treatment. In view of the fact that the cause is to be remanded to the district court we defer judgment on this section until the district court has passed on the same. We therefore certify this issue back to the district court within the same time frame as the other issue certified.

VII. *Attorneys' Fees.*

The district court awarded $22,037.73 to plaintiffs' attorneys.[41] Missouri argues (1) Planned Parenthood did not "prevail" on every issue, since only five of eight challenged sections were party invalidated; and (2) the district court included fees for travel time and clerical work. They focus mainly on the work done by the "second chair", Barbara Beran, that included taking notes on the testimony, which Missouri claims was "clerical" and not compensable at $60/hour. They also claim that travel time should not be compensated, or should be at a lower rate, and that travel was unnecessary because the suit would have been in St. Louis but for "forum-shopping" by the plaintiffs' attorney.

[26] The award of attorneys' fees should be based on the guidelines set forth in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974), adopted by this Circuit. *See Crain* v. *City of Mountain Home*, 611 F.2d 726, 730 (8th Cir. 1979); *Zoll* v. *Eastern Allamakee Com-*

---

[41]

Susman	148	hrs at $80/hr	$11,840.00
Beran	116.4	hrs at $60/hr	6,984.00
Shurin	7	hrs at $60/hr	455.00
Expenses			2,758.73
Total			$22,037.73

munity School District, 588 F.2d 246, 252 (8th Cir. 1978). The result obtained is only one factor to be considered, and it is not necessarily an abuse of discretion for the district court to award attorneys' fees based on all of the work performed and not just on the claims on which the plaintiffs were successful. "[A]ttorney's fees awarded under Section 1988 should not be limited to hours expended on those issues as to which the plaintiff was successful." *Crain* v. *City of Mountain Home*, 611 F.2d at 729 n.7. *See also Johnson* v. *Nordstrom-Larpenteur Agency*, 623 F.2d 1279, 1282 (8th Cir.), *cert. denied*, ___ U.S. ___, 101 S.Ct. 622, 66 L.Ed.2d 504 (1980); *Brown* v. *Bathke*, 588 F.2d 634, 637 (8th Cir. 1978).

[27, 28] There is no abuse of discretion in awarding attorneys' fees for a second counsel in a trial of this length and complexity. As for paying for travel time at the same rate as other activities, *Johnson* v. *Georgia Highway Express* indicates that the trial judge should consider whether the activity is legal work or other activity that could be accomplished by nonlawyers. Nonlawyers could not do the traveling for these attorneys; it was within the trial judge's discretion to award fees for the time consumed. Furthermore, the trial judge could have found that the hourly rate reflect inclusion of nonlegal activity.

The argument that the case could have been brought in the Eastern District of Missouri is frivolous. Venue was proper in the Western District and the plaintiffs' attorneys were free to choose the venue best suited to their clients' interests.

VIII. *Conclusion.*

We vacate the district court's finding that the requirement of hospitalization for second trimester abortions, under section 188.025, is unconstitutional. We re-

mand this issue to the district court for futher proceedings and findings as to whether the hospitalization requirement is a substantial burden on a woman's decision to have an abortion and, if so, whether the State has shown a compelling state interest which justifies the requirement.

We vacate the district court's finding that the provisions relating to parental or judicial consent contained in section 188.028 are unconstitutional in their entirety. Although we find the statute impermissibly requires notice to the parents of all minors, we find the judicial consent provision of the statute to be constitutional.

We reverse the district court's finding that section 188.030 of the Missouri statutes imposes strict criminal liability on doctors who abort viable fetuses. We find the Missouri law requires scienter (knowledge) by the physician such that it comports with constitutional requirements. We also reverse the district court's holding that subsection 188.030.2 is unconstitutionally vague.

Finally, we vacate the district court's holding sustaining the constitutionality of section 188.047, requiring pathology reports following all abortions. We find this requirement imposes an undue burden since there is no compelling state interest to justify it, at least in first trimester abortions.

We affirm the district court's finding that the requirement of a second doctor during an abortion of a viable unborn child pursuant to subsection 188.030.3 is unconstitutional. We likewise affirm the court's finding that a 48-hour waiting period as required by subsection 188.039.1 is unconstitutional.

We affirm the district court's finding that a portion of subsection 188.039.2 and all of subsections (1), (2), (3) and (4) thereunder are unconstitutional. These subsections

require notice to parents of all minors and prescribe detailed information a doctor must give a woman seeking an abortion. The district court correctly upheld the right of the state to require the attending physician to inform the woman as to the particular medical risks associated with the abortion technique to be used and the available alternatives. We vacate the district court's finding that the state may require a physician to file post-abortion complication reports under section 188.052.2 and remand this provision for reconsideration in view of the argument made by the parties.

We affirm the ward of attorneys' fees.

The cause is reversed in part and affirmed in part and remanded for further proceedings in accord with our directions. The district court should certify within 90 days its further findings regarding the constitutionality of sections 188.025 and 188.052.2. This court shall retain jurisdiction of this appeal until certification by the district court and further order of this court. Any petition for rehearing should be deferred until final judgment of this court; no mandate is to issue until final judgment is entered.

APPENDIX

AN ACT to repeal sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060, and 188.075, RSMo 1978, relating to regulation of abortions, and to enact in lieu thereof fifteen new sections relating to the same subject, with penalty provisions and an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060 and 188.075, RSMo 1978

are repealed and fifteen new sections enacted in lieu thereof, to be known as sections 188.015, 188.020, 188.025, 188.027, 188.028, 188.030, 188.035, 188.037, 188.039, 188.047, 188.052, 188.055, 188.060, 188.063 and 188.075, to read as follows:

188.015. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purposes of sections 188.010 to 188.085 shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Abortion facility", a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital;

(3) "Conception", the fertilization of the ovum of a female by the sperm of a male;

(4) "Physician", any person licensed to practice medicine in this state by the state board of registration of the healing arts;

(5) "Unborn child", the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus;

(6) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems.

188.020. No person shall perform or induce an abortion except a physician.

188.025. Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

188.027. No abortion shall be performed except with the prior, informed and written consent freely given of the pregnant woman.

188.028. 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required

pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

(2) Copies of the petition and a notice of the date, time, and place of the hearing shall be personally served upon each parent, guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor listed in the petition by the sheriff or his deputy. If a parent or guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis cannot be personally served within two days after reasonable effort, the sheriff or his deputy shall give constructive notice to them by certified mail to their last known address and the hearing shall not be held for at least forty-eight hours from the time of the mailing. In any case where there exists the potential or appearance of conflict of interests between the parents or guardian or next friend of the child and the child, the court shall appoint a guardian ad litem to defend the minor's interests.

The court shall set forth, for the record, the grounds for such appointment;

(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(4) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

(5) If the petition is allowed, the informed consent of the minor, pursuant to a court grant of majority rights, or the judicial consent, shall bar an action by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion. The immunity granted shall only extend to the performance of the abortion in accordance herewith and any necessary accompanying services which are performed in a competent manner. The costs of the action shall be borne by the parties.

(6) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

188.030. 1. No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman. Before a physician may perform an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to preserve the life or health of the woman and shall further certify in writing the medical indications for such abortion and the probable health consequences.

2. Any physician who performs an abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases

where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of the woman than another available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs an abortion upon a viable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

3. An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

188.035. Whoever, with intent to do so, shall take the life of a child aborted alive, shall be guilty of murder of the second degree.

188.037. No person shall use any fetus or child aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such fetus or child aborted alive.

188.039. 1. No physician shall perform an abortion unless, prior to such abortion, the physician certifies in writting that the woman gave her informed consent, freely

and without coercion, after the attending physician had informed her of the information contained in subsection 2 of this section not less than forty-eight hours prior to her consent to the abortion, and shall further certify in writing the pregnant woman's age, based upon proof of age offered by her.

2. In order to insure that the consent for an abortion is truly informed consent, no abortion shall be performed or induced upon a pregnant woman unless she has signed a consent from that shall be supplied by the state division of health, acknowledging that she and, if she is a minor, her parent or legal guardian or person standing in loco parentis have been informed by the attending physician of the following facts:

(1) That according to the best medical judgment of her attending physician she is pregnant;

(2) The number of weeks elapsed from the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physician examination and appropriate laboratory tests;

(3) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

(4) The immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and still births following abortion;

(5) The particular risks associated with the abortion technique to be used;

(6) Alternatives to abortion shall be given by the attending physician, including a list of public and private

agencies and services that will assist her during her pregnancy and after the birth of her child.

3. The physician may inform the woman of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

188.047. A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

188.052. 1. An individual abortion report for each abortion performed or induced upon a woman shall be completed by her attending physician.

2. An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such post-abortion care. This report shall include:

(1) The date of the abortion;

(2) The name and address of the abortion facility or hospital where the abortion was performed;

(3) The nature of the abortion complication diagnosed or treated.

3. All abortion reports shall be signed by the attending physician, and submitted to the state division of health within forty-five days from the date of the abortion. All complication reports shall be signed by the physician pro-

viding the post-abortion care and submitted to the division of health within forty-five days from the date of the post-abortion care.

4. A copy of the abortion report shall be made a part of the medical record of the patient of the facility or hospital in which the abortion was performed.

5. The state division of health shall be responsible for collecting all abortion reports and complication reports and collating and evaluating all data gathered therefrom and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.

188.055. 1. Every abortion facility, hospital, and physician shall be supplied with forms by the division of health for use in regards to the consents and reports required by sections 188.010 to 188.085. A purpose and function of such consents and reports shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. All information obtained by physician, hospital, or abortion facility from a patient for the purpose of preparing reports to the division of health under sections 188.010 to 188.085 or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

188.060. All medical records, reports, and other documents required to be kept under sections 188.010 to 188.085 shall be maintained in the permanent files of the abortion

facility or hospital in which the abortion was performed for a period of seven years.

188.063. No abortion facility shall advertise or hold itself out as also providing counseling to pregnant women unless:

(1) The counseling is done by a licensed physician, registered nurse or other person holding at least a bachelor's degree from an accredited college or university in psychology or appropriate field or having completed special training in counseling;

(2) The counseling includes factual information given in such a manner as to not be misleading, including explicit discussion of the development of the unborn child; and

(3) The counseling includes a thorough discussion of alternatives to abortion and availability of agencies and services to assist her if she chooses to carry her child to term.

2. The prescribed course of study which shall constitute special training in counseling shall be promulgated by the division of health. Any rule or portion of a rule promulgated pursuant to this chapter may be suspended by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor.

188.075. Any person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by sections 188.010 to 188.085 shall

be guilty of a class A misdemeanor and, upon conviction, shall be punished as provided by law.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-1130 and 80-1530

No. 80-1130.

Planned Parenthood Association of Kansas City, Missouri, Inc.,
Naim S. Kassar, M.D.,
Reproductive Health Services,
Allen S. Palmer, D.O.,
Appellees,

v.

John Ashcroft, Attorney General of State of Missouri,
Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri
Appellants.

No. 80-1530.

Planned Parenthood Association of Kansas City, Missouri, Inc.,
Naim S. Kassar, M.D.
Reproductive Health Services
Allen S. Palmer, D.O.,
Appellants,

v.

John Ashcroft, Attorney General of State of Missouri,
Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri,
Appellees.

Submitted: November 17, 1980

Filed: November 30, 1981

Appeals from the United States District Court for the Western District of Missouri

Supplemental Opinion to 655 F.2d 848.

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HARRIS,* Senior Judge.

LAY, Chief Judge.

This supplemental opinion is necessitated by reason of our previous certification to the district court relating to two issues. In our original opinion, we vacated the district court's finding that the hospitalization requirement for second trimester abortions, under section 188.025 of the Missouri statutes, is unconstitutional. We remanded that issue to the district court for further proceedings and findings as to whether the hospitalization requirement is a substantial burden on a woman's decision to have an abortion and, if so, whether the state has shown a compelling state interest which justifies the requirement. We also vacated the district court's finding that the state may require a physician to file postabortion complication reports under section 188.152.2 and remanded this provision for reconsideration in view of the argument made by the parties.

In accord with our certification the district court took

---

* Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

additional evidence[1] and made further findings regarding the statute's hospitalization requirements for all second trimester abortions.[2]

The district court, the Honorable Elmo B. Hunter presiding, found: (1) only one hospital in Missouri currently performs second trimester dilatation and evacuation (D&E) procedures; (2) second trimester D&E procedures performed in a hospital are generally significantly more expensive than the same procedures performed in an outpatient facility; and (3) requiring all second trimester abortions to be performed in a hospital results in fewer second trimester procedures being performed than if hospitalization was not required. As a result, the district court found the second trimester D&E procedure, the safest post-12 week abortion technique currently available, is an alternative which is not available to many pregnant women in Missouri. On this basis Judge Hunter found that section 188.025 creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion.

I. **Second Trimester Hospitalization Requirement.**

Section 188.025 requires that second and third trimester

---

[1] Further evidence was taken on these issues in a hearing conducted on August 6-7, 1981. At that hearing, plaintiffs elicited testimony from Judith A. Widdicombe, President and Executive Director of Reproductive Health Services; Wayne Schramm, Director of the Bureau of Health Data Analysis of the Missouri Division of Health; Dr. Stanley Henshaw, Senior Research Associate at the Alan Guttmacher Institute; and Dr. Samuel G. Eubanks, Jr., a board certified specialist in the fields of obstetrics and gynecology. Defendants presented no testimony at this hearing, but at its conclusion did introduce into evidence the deposition of Dr. Willard Cates, taken on July 21, 1981, in Atlanta, Georgia. The deposition of Dr. Cates was duly received by the court.

[2] Section 188.025 states:

Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

Mo.Ann.Stat. § 188.025 (Vernon).

abortions be performed in a hospital. Mo.Ann.Stat. § 188.025 (Vernon). If state legislation creates substantial inteference with and imposes a direct burden on a woman's decision to have an abortion, then the state requirement is to be evaluated to determine if it reasonably relates to the state's interest in maternal health. *Roe* v. *Wade,* 410 U.S. 113, 164 (1973); *Planned Parenthood Ass'n* v. *Ashcroft,* 655 F.2d 848, 854 (8th Cir. 1981).

This court concluded previously, and additional evidence presented to the district court reinforces the conclusion, that D&E is the most used and safest procedure for second trimester abortion. *Ashcroft,* 655 F.2d at 855.

At the original trial of this action, the district court concluded that second trimester D&E was available only in one hospital in Missouri. That conclusion rested solely on the personal knowledge of two physicians, neither of whom testified that he was familiar with the policies of the hospitals throughout the state. However, evidence presented at the evidentiary hearing persuasively corroborates the district court finding.[3] The state did not dispute that

---

[3] Wayen Schramm, the Director of the Bureau of Health Data Analysis for the Missouri Center for Health Statistics, testified that in 1981 his office began to record second trimester abortions by the D&E method. Only one hospital reported performing any second trimester abortions by the D&E procedure. This is the same hospital, Truman of Kansas City, reported in the previous proceedings before the court.

Stanley Henshaw, Senior Research Associate at the Alan Guttmacher Institute, which collects and analyzes abortion statistics on a state-by-state basis, testified that in 1979 and 1980, three hospitals reported one or more second trimester abortions by any method. The Kansas City hospital did more than 99 per cent of all second trimester abortions in those two years. One hospital reported one second trimester abortion in each of those two years; the other reported three abortions in each of the two years. He testified that the Institute inferred that those latter two hospitals are not really making abortion services available to women given the infrequency of second trimester abortions at those two hospitals.

any hospital other than Truman Medical Hospital has performed or is willing to perform second trimester abortions using the D&E procedures.

The record demonstrates that hospitalized D&E's are more expensive than nonhospitalized D&E's. There exists evidence that some hospitalized second trimester D&E procedures are twice as expensive as nonhospitalized D&E procedures.[4] The district court concluded from the evidence that requiring hospitalized second trimester abortions places a financial burden on many women seeking such abortions.[5] On the basis of the record presented, this finding is not clearly erroneous.

---

[4] Dr. Samuel G. Eubanks, Jr., a practicing physician in Louisville, Kentucky, specializes in obstetrics and gynecology. He practices in an office that has performed 15,500 abortions since 1976; he personally has performed approximately 1,400 second trimester D&E's. He testified that in Kentucky the average cost of a nonhospitalized second trimester abortion was about one-half the cost of what it would be in the hospital.

In the original proceedings, witnesses testified that the increase in the cost burden to the woman of obtaining second trimester D&E's in hospitals, rather than clinics, runs from $150.00 to $1,650.00.

[5] During the period when all second trimester abortions were required to be performed in hospitals, 540 procedures were performed. In 1980, when that requirement was removed, the total number of second trimester procedures performed in Missouri was 1,390, 700 of which were performed in hospitals and 690 of which were performed in outpatient facilities. Dr. Henshaw testified that Missouri met only 13 per cent of the perceived need for second trimester abortions in the state in 1979; however, it met 34 per cent of the perceived need in 1980. In 1980, there were two second trimester abortion providers in the state, Truman Medical Hospital of Kansas City and Reproductive Health Services of St. Louis, a clinic. In 1979, only Truman Medical Hospital provided second trimester abortions. Dr. Henshaw would not infer that Reproductive Health Services substantially met all the need for second trimester abortions in the St. Louis area. Dr. Henshaw also testified that nationally 9 per cent of all abortions performed were second trimester abortions. In 1979, 3.4 per cent of all abortions performed in Missouri were second trimester abortions, but in 1980, when

(Continued on next page)

Since section 188.025 creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion, the state has the burden of showing that Missouri's requirement reasonably relates to the protection of the woman's health. As we stated in our previous decision, the state must show that nonhospitalized D&E procedures can reasonably be considered more dangerous than hospital procedures, including hospitalized D&E. *Ashcroft*, 655 F.2d at 856.

The central issue is the relative safety of nonhospitalized D&E and hospitalized methods. No quantitative studies are cited which directly compare the relative safety of the two procedures. However, the district court has found explicitly that a nonhospitalized second trimester D&E procedure is just as safe as those second trimster D&E procedures conducted in hospitals.[6] Since the district

---

Footnote continued
abortions could be performed in outpatient clinics, the figure was 6.9 per cent.

Dr. Eubanks also testified that the higher cost of hospitalized second trimester D&E procedures placed a financial burden on many patients seeking abortions.

[6] We are aware of the Sixth Circuit's decision in *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 651 F.2d 1198 (6th Cir. 1981). In *Akron*, the plaintiffs tried to show that because of the D&E procedure, abortion through the 17th or 18th week of pregnancy is safer than childbirth. Thus, they argued that, under *Roe* v. *Wade*, the state's interest in maternal health does not become compelling before that time and the requirement that all second trimester abortions be performed in hospitals is unconstitutionally overbroad.

In the district court, the plaintiffs presented evidence that early second trimester clinical abortions were just as safe as second trimester abortions performed in hospitals. The district court, however, did not find plaintiff's evidence so convincing that it was willing to discard the Supreme Court's formulation in *Roe* v. *Wade*.

The Sixth Circuit noted that two district courts held that the state's interest in the health of the pregnant woman does not become compelling until the 18th week of pregnancy. *Margaret* v. *Edwards*, 488 F.

(Continued on next page)

court's finding is not clearly erroneous, we find that nonhospitalized second trimester D&E procedures are no more dangerous to maternal health than hospitalized procedures. Consequently, we hold that section 188.025 is not reasonably related to maternal health and, therefore, the requirement that *all* second trimester abortions be performed in hospitals is unconstitutional. *See Planned Parenthood* v. *Danforth*, 428 U.S. 52, 76 (1976).

II. Recordkeeping.

Subsection 188.052.2 of the Missouri statutes requires physicians to complete individual complication reports con-

---

Footnote continued

Supp. 181, 194-96 (E.D. La. 1980) and *Planned Parenthood Ass'n* v. *Ashcroft*, 483 F. Supp. 679, 687 (W.D. Mo. 190). The Sixth Circuit found the rationale of these decisions persuasive. However, it also found that, by affirming *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F. Supp. 894, 896-902 (N.D.Ind. 1980), *aff'd sub nom. Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, ——— U.S. ———, 101 S.Ct. 2012 (1981), the Supreme Court had an opportunity to retreat from the "bright line" drawn in *Roe* v. *Wade* and declined to do so. Thus, it affirmed the district court's holding that the statute was constitutional.

Evidence adduced at the original trial in this cause and the evidentiary hearing suggests that the nonhospitalized procedures may actually be safer. The evidence cited in the original opinion is noted by this court in *Ashcroft*, 655 F.2d at 857 n.12. At the evidentiary hearing, Dr. Willard Cates, Chief of the Abortion Surveillance Branch of the Family Planning Evaluation Division at the Center for Disease Control, stated that in his opinion D&E procedures through 16 weeks after the last menstrual period (14 weeks after conception) are just as safe in outpatient facilities as they are in hospitals. The district court views the testimony of Dr. Cates to say that section 188.025 prevents D&E procedures, particularly in the 15th and 16th weeks after the last menstrual period. Also, the district court concluded that, even though testimony tended to show that hospitals are better equipped to treat postabortion infections, such infections do not occur until 24 to 72 hours after the procedure is completed. By that time a patient will have been dismissed from either a hospital or an outpatient facility.

cerning postabortion care that they provide.[7] Plaintiffs argue that a physician may be faced in completing these reports with the situation where the patient will not or cannot provide the necessary information. Plaintiffs argue that the physician is then faced with the dilemma of filing a report with incomplete date, thereby subjecting himself to criminal liability, or refusing to treat the patient.

The district court was not convinced that a reasonable interpretation of subsection 188.052.2 would place physicians in the dilemma envisioned by plaintiffs. The court interprets the statute to require physicians to complete the reports using data that is reasonably available to them. That interpretation is shared by the Missouri attorney general. Since physicians are required only to report information that is reasonably available to them, section 188.052.2 does not place physicians in the dilemma of refusing treatment to patients or subjecting themselves to criminal liability by filing an incomplete report when the patient refuses to or cannot provide date to be included in the postabortion complication report.

The reporting requirement is not subject to strict scrutiny analysis, as there are no suspect classifications or fundamental rights at stake. The reporting requirement need only be rationally related to a constitutionally permissible purpose. The district court, finding that the reporting require-

---

[7] Subsection 1889.052.2 states:

> An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such postabortion care. This report shall include:
>
> (1) The date of the abortion;
>
> (2) The name and address of the abortion facility or hospital where the abortion was performed;
>
> (3) The nature of the abortion complication diagnosed or treated.

Mo.Ann.Stat. § 188.052.2 (Vernon).

ments are consistent with the holding of *Planned Parenthood* v. *Danforth*, *supra*, ruled that it is rationally related. The requirements of subsection 188.052.2 provide the state with information that is helpful to medical assistance, judgments, and medical standards. Thus, it is also reasonably related to the state's interest in protecting maternal health. *Connecticut* v. *Menillo*, 423 U.S. 9, 10-11 (1975); *Roe* v. *Wade*, 410 U.S. at 164.[8]

III. Conclusion

We affirm the district court's finding that the requirement of hospitalization for second trimester abortions under section 188.025 is unconstitutional. We affirm the district court's finding that a state may require a physician to file postabortion complication reports under subsection 188.052.2. These rulings shall be incorporated into our prior judgment, *Planned Parenthood Ass'n* v. *Ashcroft*, 655 F.2d 848 (8th Cir. 1981), and the integrated judgment as not amended shall issue.

It is so ordered.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[8] Dr. Cates testified that keeping the type of statistics mandated by the statute has been shown to contribute to the safety of abortion procedures.

FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN ASHCROFT, etc., *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

On Cross-Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE CITY OF ST. LOUIS, MISSOURI AS AMICUS CURIAE IN SUPPORT OF THE CROSS-PETITIONERS

JOSEPH R. NIEMANN
City Counselor
JAMES J. WILSON
Associate City Counselor
ROBERT H. DIERKER, JR.*
Assistant City Counselor
314 City Hall
St. Louis, Missouri 63103
314-622-3361
Attorneys for City of St. Louis, Missouri, as Amicus Curiae

*Denotes Counsel of Record

March, 1982

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Missouri may require by statute that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

2. Whether the State of Missouri may require by statute the attendance of a second physician, in addition to the primary surgeon, before an abortion of a viable fetus may be performed.

3. Whether the State of Missouri may require by statute the attendance of a second physician, in addition to the primary surgeon, before an abortion of a viable fetus may be performed.

4. Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. §1988, should be proportioned to accurately reflect the extent to which a plaintiff prevails.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Cases	iv
Constitutional Provision	iv
Statutes	iv
Interest of Amicus	1
Reasons for Granting the Writ	
I. The cross-petition should be granted because the questions presented therein, particularly the first question, relating to the scope of a state's power to regulate performance of abortions after the first trimester of pregnancy, are of continuing and substantial national importance, and must be settled by this Court...	3
II. The petition should be granted because the decision of the Court of Appeals on the questions presented is in direct conflict with decisions of other Courts of Appeals and this Court.	9
Conclusion	12

TABLE OF AUTHORITIES

Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981) pet. for cert. pending, Nos. 81-746, 81-854, 81-1172 9,11

Connecticut v. Menillo, 423 U.S. 9 (1975) 8

Doe v. Bolton, 410 U.S. 179 (1973) 3,11

Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 496 F.Supp. 894, (N.D. Ind. 1980), aff'd ____ U.S. ____ 101 S.Ct. 2012 (1981) 5,10,11

Hutto v. Davis, ____ U.S. ____, 70 L.Ed.2d 556 (1982) . 11

Maher v. Roe, 432 U.S. 464 (1977) 3,5

Metromedia, Inc. v. City of San Diego, ____ U.S. ____, 101 S.Ct. 2882 (1981) 11

Planned Parenthood Ass'n. of Kansas City v. Ashcroft, 655 F.2d 848, supplemented, 664 F.2d 687 (8th Cir. 1981) 2

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) 3,4,8

Reproductive Health Services, Inc., et al., v. Eugene Camp, et al, No. 81-1439 C (2), E.D.Mo. 2

Roe v. Wade, 410 U.S. 113 (1973) 3,8,9,11

Wynn v. Scott, 449 F.Supp. 1302 (N.D.Ill. 1978), aff'd 599 F.2d 193 (7th Cir. 1979) 11

Fourteenth Amendment to the United States Constitution, Section 1 8

Supreme Court Rule 36.4 1

§188.025, R.S.Mo. 1978 4

No. 81-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN ASHCROFT, etc., *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

On Cross-Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE CITY OF ST. LOUIS, MISSOURI AS AMICUS CURIAE IN SUPPORT OF THE CROSS-PETITIONERS

This brief is presented for the City of St. Louis, a political subdivision of the State of Missouri, and is sponsored by the authorized law officer of the City of St. Louis. The brief is filed pursuant to Supreme Court Rule 36.4. The cross-petition for writ of certiorari supported by the City as amicus curiae was filed on March 1, 1982, and this brief is filed within the time allowed for filing a brief in opposition to said cross-petition.

INTEREST OF AMICUS

The City of St. Louis is a constitutional charter city of Missouri. As such, it has substantial authority to regulate businesses functioning within its boundaries. Under its Charter

and the law of Missouri, the City of St. Louis can and does provide for the licensing and regulation of hospitals and clinics, including abortion clinics. In 1974, the City of St. Louis enacted Ordinance No. 56729, regulating the performance of abortions within the City boundaries. Among the provisions of Ordinance No. 56729 was a requirement that abortions after the twelfth week of gestation be performed only in hospitals, and that reports be filed by abortion clinics stating information relative to the number, types, and complications of abortions performed in the City of St. Louis by the reporting facility. On November 12, 1981, Reproductive Health Services, Inc., one of the Respondents in No. 81-1623 (petitioners in No. 81-1255 here) instituted an action in United States District Court for the Eastern District of Missouri against certain officers of the amicus City, seeking to enjoin enforcement of Ordinance No. 56729. *Reproductive Health Services, Inc., et al.* v. *Eugene Camp, et al.*, No. 81-1439 C (2), E.D.Mo. A preliminary injunction issued on December 7, 1981. In response to a motion filed by defendants, the District Court stayed further proceedings "pending the disposition of the petitions for certiorari or appeals from the judgment of the Eighth Circuit in *Planned Parenthood of Kansas City*, 655 F.2d 848, (8th Cir. 1981)." Thus, the disposition of the questions presented by the cross-petition for writ of certiorari in the instant case (particularly the first question) will directly affect pending litigation involving an ordinance of the amicus, and will affect the general scope of the City's regulatory powers in this area.

REASONS FOR GRANTING THE WRIT

I. THE CROSS-PETITION SHOULD BE GRANTED BECAUSE THE QUESTIONS PRESENTED THEREIN, PARTICULARLY THE FIRST QUESTION, RELATING TO THE SCOPE OF A STATE'S POWER TO REGULATE PERFORMANCE OF ABORTIONS AFTER THE FIRST TRIMESTER OF PREGNANCY, ARE OF CONTINUING AND SUBSTANTIAL NATIONAL IMPORTANCE, AND MUST BE SETTLED BY THIS COURT.

In *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), this Court was confronted with the first State legislative attempts to regulate the performance of abortions in the aftermath of *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). Asserting that *Roe* v. *Wade* emphatically rejected the argument that the woman's right to abortion is absolute and that she is entitled to abortion " 'at whatever time, in whatever way, and for whatever reason she alone chooses,' " 428 U.S. at 60, the Court reiterated that, in light of *Roe*, the State may, after the first trimester of pregnancy, regulate the abortion procedure in ways that are reasonably related to maternal health. 428 U.S. at 61; see also *Maher* v. *Roe*, 432 U.S. 464 (1977). With uncommon prescience, Justice WHITE wrote that the "task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process." *Planned Parenthood, supra*, at 92. The instant case clearly reprsents the "third wave" of attack upon State regulation of abortion, which, unless turned back by this Court, will, in practical effect, guarantee "abortion on demand" at least through the eighteenth week of pregnancy, and probably whenever substantial medical opinion can be mustered to support a "safe" procedure, without regard to weeks of gestation. More importantly, however, the decision below is fraught with serious consequences for the police power of the States in areas far beyond regulation of abortion.

The District Court in this instant case found that a particular second trimester abortion procedure ("D & E") was not (at the time of trial) readily available in hospitals in Missouri, that this procedure would be more expensive if performed in a hospital, and that the statutory requirement that all second trimester abortions be performed in hospitals resulted in performance of fewer second trimester abortions in Missouri than would otherwise be the case. The District Court also found "D & E" to be the safest second trimester abortion technique currently available. Consequently, the Missouri hospitalization requirement made "D & E" unavailable to "many" women in Missouri, and thereby created a substantial interference with or a direct burden on the decision to have an abortion. See Cross-Petition, A-115. Since the "D & E" procedure was as safe, in the view of both the District Court and the Court of Appeals, when performed in a hospital as not, the burden of justification placed on the State was insurmountable, and both lower courts found it appropriate to invalidate the hospitalization requirement for *all* second trimester abortions.

The conclusion of the courts below that the second-trimester hospitalization requirement is an unduly burdensome interference with the woman's freedom to decide whether to terminate her pregnancy seems to rest on insecure foundations. The primary factors in this conclusion were the degree to which one type of second trimester procedure ("D & E") was available in Missouri hospitals, and the relative cost of non-hospitalized and hospitalized "D & E" procedures. See Cross-petition A-117 - A-118. Once this was shown, the issue became relative safety, not of *all* hospitalized and non-hospitalized second trimester abortions, but rather of hospitalized and non-hospitalized "*D & E*" procedures. *Id.* at A-118. The statute at issue, §188.025, R.S.Mo. 1978, did not draw its lines so narrowly, and seemingly it should be appraised on the same basis as it applies. Unlike the statute in *Planned Parenthood of Missouri* v. *Danforth, supra,* §188.025, R.S.Mo. 1978, does not prescribe or proscribe any

method of abortion; it merely seeks to insure that *all* second trimester abortions are performed under conditions assuring maximum safety for the women. The courts below did not find that hospitalized second trimester abortions do not insure maximum safety, they merely concluded that *some* non-hospitalized abortion procedures are *as safe*. It does not follow that a hospitalization requirement for all such procedures is not reasonably related to maternal health.

The crux of the opinion of the Court of Appeals in this case is found in its conclusion that because *some* second-trimester abortions can be performed safely and cheaply outside of hospitals, a requirement that all such abortions be performed in hospitals constitutes an impermissible or unduly burdensome interference with the pregnant woman's freedom to decide whether to terminate her pregnancy, unsupported by any reasonable relationship to the protection of maternal health. See Cross-petition A-117 - A-119; but cf. *Maher* v. *Roe, supra.* This approach is clearly at variance with due process and equal protection analysis applicable to State regulations under the police power, whether in the abortion context or not.[1] The Court of Appeals here has created the precise situation which led the three-judge court to reject an almost identical challenge to a Michigan second-trimester hospitalization requirement involved in *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen,* 496 F.Supp. 894, 899-900 (N.D.Ind. 1980), aff'd, ____ U.S. ____, 101 S.Ct. 2012 (1981):

---

[1] It is not easy to characterize the analyses applied by this Court in evaluating abortion regulations. Challenges on vagueness or overbreadth grounds seemingly have involved due process, see *Colautti* v. *Franklin,* 439 U.S. 379 (1979), while others have apparently proceeded on some form of equal protection theory, i.e., that abortions (or the person seeking them) should not be treated differently than other medical procedures (or persons seeking them). Cf. *Maher* v. *Roe, supra; H.L.* v. *Matheson,* ____ U.S. ____, 101 S.Ct. 1164 (1981). Perhaps all of these theories are best classified as substantive due process.

To adopt the plaintiffs' theory and hold Indiana's hospitalization requirement unconstitutional because of its impact on nontherapeutic early second trimester D & E abortions would ultimately require that the second trimester be split for purposes of determining the constitutionality of regulations. Such a holding would require states to adopt, for their maternal health regulations, some cutoff other than the end of the first trimester. The *Roe* language clearly demonstrates the intent of the Supreme Court to encourage, indeed force, states to use the end of the first trimester as a cutoff point for regulations designed to protect maternal health. That is precisely what Indiana and many states have done. *Roe* implied that states would not be required to treat one portion of the second trimester different from another portion of the second trimester. *Roe* implied that it was proper for states to adopt regulations dealing with the entire second trimester. If a general regulation of second trimester abortions protects maternal health, then, *Roe* holds, the regulation is constitutional, notwithstanding its impact on a specific second trimester abortion or a specific group of second trimester abortions.

* * *

. . . Under *Roe,* a maternal health regulation may take effect at the end of the first trimester. If the constitutionality of the regulation depended on whether, as a matter of fact, an abortion was more dangerous than childbirth, then it must be remembered that each individual pregnancy raises its own set of facts. The safety of a given abortion, the safety of a given childbirth, and the relative safety of an abortion vis a vis childbirth in a given pregnancy, all depend on a multitude of medical factors which vary with each and every pregnancy. Such a rule would have the potential of making the constitutionality of each specific application of a regulation depend to a large degree on the

> factors present in that specific case. If the Supreme Court had intended that complicated medical judgment be decisive on whether specific regulations were reasonably related to maternal health, then the Supreme Court would surely have instead adopted the more rational rule that the abortion's effectuation must be left to the medical judgment of the pregnant woman's attending physician. That was the rule adopted for first trimester abortions. It was the intent of the Supreme Court to allow states to regulate second trimester abortions as a group, and *Roe* holds that as long as the regulation is reasonably related to the maternal health of women in the second trimester of their pregnancy, the regulation is constitutional.

What the Court of Appeals has protected in this case is not the pregnant woman's right to obtain an abortion, but rather the physician's right to choose where the abortion shall be performed. The scope of this right is apparently controlled solely by the weight of prevailing medical opinion (as reflected by the evidence presented by specific parties at a specific point in time before a district court).

"The Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortion." *H.L.* v. *Matheson, supra,* 101 S.Ct. at 1173. Yet the Court of Appeals in this case demands precisely such fine-tuning:

> The central issue is the relative safety of nonhospitalized D & E and hospitalized methods. No quantitative studies are cited which directly compare the relative safety of the two procedures. However, the district court has found explicitly that a nonhospitalized second trimester D & E procedure is just as safe as those second trimester D & E procedures conducted in hospitals. Since the district court's finding is not clearly erroneous, we find that nonhospitalized second trimester D & E procedures are no more dangerous to maternal health than hospitalized procedures. Consequently, we hold that section 188.025 is not

> reasonably related to maternal health and, therefore, the requirement that all second trimester abortions be performed in hospitals is unconstitutional. See *Planned Parenthood* v. *Danforth,* 428 U.S. 52, 76 (1976).

[Cross-petition A-118 - A-119. Footnote omitted.]

Safety of surgical procedures is almost always likely to be relative, and the State "has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe* v. *Wade, supra,* 410 U.S. at 150; see also *Connecticut* v. *Menillo,* 423 U.S. 9 (1975). That *some* second-trimester abortion procedures may be safe if performed outside hospitals surely does not warrant invalidation of a regulation applicable to all such procedures, if the regulation in general is reasonably related maternal health. See *Planned Parenthood of Missouri* v. *Danforth, supra.* No doubt some abortions performed by nonlicensed personnel are performed as safely as those performed by physicians, but legislation must of necessity operate on classes and not on a case-by-case basis. Cf. *Connecticut* v. *Menillo, supra.*

This Court has previously recognized that a legitimate State interest in maternal health attaches during the second trimester of pregnancy, justifying certain regulations in furtherance of that interest. *Roe* v. *Wade, supra; Planned Parenthood of Missouri* v. *Danforth, supra.* The Court of Appeals would contract (or expand) that regulatory authority almost annually, based upon mortality and morbidity statistics and the degree to which abortion procedures are introduced or become obsolete. Obviously this cannot be the definition of the scope of State regulatory authority under the Fourteenth Amendment with respect to abortion. The judgment as to what will best insure maximum safety for the pregnant woman is one that the legislature must make; the courts should intervene only when that judgment unduly burdens all women seeking abortion dur-

ing the second trimester and is not reasonably related to maternal health. Since the judgment made by the legislature of Missouri in this case, considered in the proper context, does not unduly burden the choice to seek a second trimester abortion and is not irrational, but is in fact reasonably related to maternal health, the judgment of the Court of Appeals cannot stand, and certiorari should issue to review and correct the decision below.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS ON THE QUESTIONS PRESENTED IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT.

In striking down Missouri's regulatory scheme applicable to second trimester abortions, the Court of Appeals took note of the conflicting decisions of lower federal courts on the subject. Cross-Petition, A-118 - A-119, n. 6. In particular, the Court of Appeals was aware of *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 651 F.2d 1198 (6th Cir. 1981), pet. for cert. pending, Nos. 81-746, 81-854, 81-1172. More importantly, the Court of Appeals in the instant case also ignored controlling decisions of this Court. In *Roe* v. *Wade, supra* 410 U.S. at 163, this Court expressly stated:

> With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Ex-

amples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

Subsequently, in *Gary-Northwest Indiana Women's Service, Inc.* v. *Bowen, supra,* a three-judge district court rejected a constitutional challenge to a regulatory scheme similar to Missouri's. Respecting the hospitalization requirement for second trimester abortions, the district court stated (496 F.Supp. at 900):

> The plaintiffs' argument could be construed as an argument that the Roe test to be applied to early second trimester D & E abortions is not the second trimester test, but the first trimester test. This argument could be stated as follows: Roe allows regulation not of second trimester abortions, but only of abortions more dangerous than childbirth. This seems to be the theory underlying the two District Court cases supporting the plaintiffs' argument. The specific ultimate rulings of Roe with regard to the various stages of pregnancy were somewhat arbitrary judgments necessitated by a wide variety of factors. This Court must respect Roe's specific ultimate rulings. If this Court does not respect the specific ultimate ruling in Roe, those rulings will lose their usefullness. In the line which the Supreme Court drew at the end of the first trimester is not respected, states will be hard pressed to pursue their legitimate, compelling, interests in protecting maternal health. If a regulation is covered by Roe, the regulation's constitutionality is determined on the basis of specific lines drawn by the Supreme Court.

On direct appeal, this Court summarily affirmed. 101 S.Ct. 2012. See also, *Wynn* v. *Scott*, 449 F.Supp. 1302 (N.D. Ill. 1978), appeal dismissed, 439 U.S. 8 (1978), aff'd 599 F.2d 193 (7th Cir. 1979). Although a summary affirmance is recognized as lacking the same precedential value as a judgment of this Court delivered after plenary consideration, the binding precedential effect of such a decision until this Court takes other action cannot be doubted. See, e.g., *Metromedia, Inc.* v. *City of San Diego*, ___ U.S. ___, 101 S.Ct. 2882 (1981); *Akron Reproductive Services, Inc.* v. *City of Akron, supra.* Nevertheless, the Court of Appeals in this case chose to disregard both the clear language of *Roe* v. *Wade* and the force and effect of *Gary-Northwest, supra,*[2] relying instead upon its own conception of what the law should be and its own judgment of what good medical practice permits.

Clearly, the Constitution must be the same for both the Eighth Circuit and the Sixth Circuit, and the decisions of this Court should not be ignored or amended by the lower federal courts at will - regardless of the nature of the issue. See, e.g., *Hutto* v. *Davis*, ___ U.S. ___, 70 L.Ed.2d 556 (1982). Accordingly, certiorari should be granted on the cross-petition so that this Court can resolve the conflict among the lower federal courts on the questions herein,[3] and restore the "bright line" drawn by *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra.*

---

[2] The jurisdictional statement in *Gary-Northwest* clearly presented the constitutional question at issue here, albeit in the preliminary injunction context. 49 U.S.L.W. 3691 (1981)

[3] Amicus City also strongly believes that the fourth question presented in the cross-petition merits consideration by the Court.

CONCLUSION

The decision of the Court of Appeals in this case implies that the scope of State regulatory powers can be delimited in certain areas (such as abortion regulation) by the balance of professional opinion of certain procedures at a certain point in time. Constitutional law cannot rest upon such shifting sands. Certiorari should issue to review and correct the judgment of the Court of Appeals.

Respectfully submitted,

JOSEPH R. NIEMANN,
City Counselor
JAMES J. WILSON,
Associate City Counselor
ROBERT H. DIERKER, JR.
Assistant City Counselor
314 City Hall
St. Louis, Missouri 63103
622-3361

Attorneys for Amicus Curiae
City of St. Louis

Office - Supreme Court, U.S.
FILED
SEP 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES and ALLEN S. PALMER, D.O.,
Respondents,

vs.

JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,
Petitioners.

On A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS

FRANK SUSMAN
BARBARA L. BERAN
SUSMAN, SCHERMER, RIMMEL & PARKER
Aragon Place - Tenth Floor
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

THE QUESTIONS PRESENTED FOR REVIEW

Respondents adopt the "Questions Presented for Review" as contained in "Brief for the Cross-Petitioners" (hereafter "Defts. Br. ____") at I.

TABLE OF CONTENTS

	Page
The Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Cases	iv
Statutes	vii
Other Authorities	viii
Official Reports of Opinions Below	1
Statement of Jurisdictional Grounds	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
I - The In-Hospital Requirement, §188.025	2
II - The Second Physician Requirement, §188.030.3	12
III - The Pathology Requirement, §188.047	13
IV - The Award of Attorneys' Fees and Costs	15
Summary of Argument	17
The Applicable Standards of Review	17
I - The In-Hospital Requirement, §188.025	17
II - The Second Physician Requirement, §188.030.3	17

III - The Pathology Requirement, §188.047 18

IV - The Award of Attorneys' Fees and Costs 18

Argument 19

The Parties' Witnesses 19

Plaintiffs' Expert Witnesses In Order Of Testimony 19

The Applicable Standards of Review 22

The Legal Standard 24

I - The In-Hospital Requirement, §188.025 29

II - The Second Physician Requirement, §188.030.3 45

III - The Pathology Requirement, §188.047 46

IV - The Award of Attorneys' Fees and Costs 47

Conclusion 49

TABLE OF AUTHORITIES

Cases

Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D.Ohio 1979), *affirmed in part, reversed in part,* 651 F.2d 1198 (6th Cir. 1981), *cert. granted,* 50 U.S.L.W. 3934 (May 24, 1982) 24,37

Baird v. Department of Public Health of the Commonwealth of Massachusetts, 599 F.2d 1098 (1st Cir. 1979) 46

Carey v. Population Services International, 431 U.S. 678 (1977) 31

Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) 23,24,37

Colautti v. Franklin, 439 U.S. 379 (1979) 45

Cooper v. Aaron, 358 U.S. 1 (1958) 50

Copeland v. Marshall, 641 F.2d 880 (D.C.Cir. 1980) ... 48

Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D.Cal. 1974) 48

Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981) 24

Doe v. Bolton, 410 U.S. 179 (1973) .17,22,23,24,29,44,46,49,50

Franklin v. Fitzpatrick, 401 F.Supp. 554 (E.D.Pa. 1975), *summarily affirmed,* 428 U.S. 901 (1976) ... 41

Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978), *summarily affirmed,* 440 U.S. 941 (1979) 47

Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 496 F.Supp. 894 (N.D.Ind. 1980), *summarily affirmed* sub nom. Gary-Northwest Indiana Women's Services, Inc. v. Orr, 451 U.S. 935 (1981) 38, 39,40,41,42,43

Gerstein v. Coe, 517 F.2d 787 (5th Cir. 1975), *summarily affirmed,* 428 U.S. 901 (1976) 41

Gibson v. Berryhill, 411 U.S. 564 (1973) 40

Hanrahan v. Hampton, 446 U.S. 754 (1980) 48

Harris v. McRae, 448 U.S. 297 (1980) 29

Hensley v. Eckerhart, No. 81-1244, *cert. granted,* 50 U.S.L.W. 3695 (March 1, 1982) 47

Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976) 46,47

Hutto v. Finney, 437 U.S. 678 (1978) 48

Illinois Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 40,42,43

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 50 U.S.L.W. 4592 (June 1, 1982) 36

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) 48

Lamphere v. Brown University, 610 F.2d 46 (1st Cir. 1979) 48

Maher v. Gagne, 448 U.S. 122 (1980) 48

Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979), *vacated and remanded,* 447 U.S. 918 (1980) 42

Mandel v. Bradley, 432 U.S. 173 (1977) 40,43

Margaret S. v. Edwards, 488 F.Supp. 181 (E.D.La. 1980) 37,43

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th cir. 1979) 48

Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 483 F.Supp. 679 (W.D.Mo. 1980), *affirmed in part, reversed in part, remanded in part,* 655 F.2d 848 (8th Cir. 1981), *final opinion,* 664 F.2d 687 (8th Cir. 1981), *cert. granted,* 50 U.S.L.W. 3934 (May 24, 1982)... 24, 33,34,35,36,38,44,46,47

Planned Parenthood of Central Missouri v. Danforth, 392 F.Supp. 1362 (E.D.Mo. 1975), *affirmed in part, reversed in part,* 428 U.S. 52 (1976) 31,32,41,42,43,44

Pullman-Standard, a division of Pullman, Incorporated v. Swint, 50 U.S.L.W. 4425 (April 27, 1982) 36

Reproductive Health Services v. Freeman, 614 F.2d 585 (8th Cir. 1980) 48

Roe v. Wade, 410 U.S. 113 (1973) 17, 22,24,29,30,41,44,46,49,50

Rogers v. Lodge, 50 U.S.L.W. 5041 (July 1, 1982) 37

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 29

Seattle School District No. 1 v. The State of Washington, 633 F.2d 1338 (9th Cir. 1980) 48

Seigal v. Merrick, 619 F.2d 160 (2nd Cir. 1980) 48

Sherkow v. State of Wisconsin, 630 F.2d 498 (7th Cir. 1980) 48

Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D.Cal. 1974) 48

Thomas v. Collins, 323 U.S. 516 (1945) 29

United States v. Ross, 50 U.S.L.W. 4580 (1982) 29

University of Texas v. Camenisch, 451 U.S. 390 (1981) . 40,41

Wolfe v. Stumbo, 519 F.Supp. 22 (W.D.Ky, 1980), *remanded*, ____ F.2d ____ (6th Cir. September 17, 1981) 37

Women's Medical Center of Providence, Inc. v. Roberts, 530 F.Supp. 1136 (D.R.I. 1982)...24,25,26,27,28

Statutes

Title 42, United States Code, §1988 18,48

Other Authorities

Abortion Services in Planned Parenthood Affiliates (December 15, 1977) 31

APHA Recommended Program Guide For Abortion Services (Revised 1979), AMERICAN JOURNAL OF PUBLIC HEALTH, Vol. 70, No. 6, June, 1980, p. 652 30,31

Cates, *et al., Mortality From Abortion And Childbirth,* THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, Vol. 248, No. 2, July 9, 1982, p. 188 44,45

Center For Disease Control Abortion Surveillance, 1977, U.S. DEPT. H.E.W., September, 1979 3

Center For Disease Control Abortion Surveillance, 1978, U.S. DEPT. H.E.W., November, 1980 2,4

Henshaw, *et al., Abortion Services In The United States, 1979 and 1980,* FAMILY PLANNING PERSPECTIVES, Vol. 14, No. 1, Jan./Feb. 1982. 49

House Report No. 94-1558, 94th Congress, 2d Session 1 (1976) 48

Manual of Standards For Obstetrical-Gynecological Services Of The American College Of Obstetricians And Gynecologists (1982) 31

Senate Report No. 94-1011, 94th Congress, 2d Session 1 (1976) 48

No. 81-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES and ALLEN S. PALMER, D.O.,

Respondents,

VS.

JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,

Petitioners.

On A Writ Of Certiorari To The
United States Court of Appeals For The
Eighth Circuit

BRIEF OF RESPONDENTS

OFFICIAL REPORTS OF OPINIONS BELOW

Respondents adopt the "Opinions Below" as contained in "Brief for the Cross-Petitioners" (Defts. Br. 1-2).

STATEMENT OF JURISDICTIONAL GROUNDS

Respondents adopt the statement of "Jurisdiction" as contained in "Brief for the Cross-Petitioners" (Defts. Br. 2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the "Constitutional and Statutory Provisions Involved" as contained in "Brief for the Cross-Petitioners" (Defts. Br. 2-4).

STATEMENT OF THE CASE

I.

The In-Hospital Second Trimester Requirement (MO.REV.STAT., § 188.025)

In the United States during the year 1981, 82.1% of all early second trimester abortions (13-15 weeks) were performed by the D&E method and 54% of all second trimester abortions from 13-20 weeks. *Center for Disease Control Abortion Surveillance, 1978,* U.S. DEPT. H.E.W., November 1980, Table 14 at 43. Defendants' own expert Dr. Nathanson agreed. (J.A. 144). In Missouri, 99.3% and 99.7% of all second trimester abortions were performed by the D&E method in 1979 and in 1980, respectively. (Transcript on Remand 71-72 [hereafter "T.R. ____"], Henshaw). In Missouri, in 1979 all second trimester abortions performed by the D&E method were performed by Truman Medical Center, a hospital in the Kansas City, Missouri area. (Joint Appendix 167, 170 [hereafter "J.A. ____"], Schramm). The District Court's opinion voiding this Section was filed on January 23, 1980. ("Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" at A-1 [hereafter "Cross-Pet. ____"]).

Prior to 1980, this Section proved to be an extremely successful effort by the State of Missouri to thwart the full exercise of abortion rights and to reduce drastically the total number of abortions performed. Requiring an in-hospital procedure after 12 weeks gestation had virtually eliminated abortions after 12

weeks gestation in Missouri, by reason of the astronomical costs, increased patient risk, additional time delay imposed, the unavailability of resources, and the loss of anonymity, all associated with such in-hospital procedures. In those states permitting post-12 week abortions to be performed at facilities consistent with the attending physician's best medical judgment, statistics clearly demonstrated a greater number of procedures being performed post-12 weeks.

In 1976, 90.0% of all abortions in Missouri were performed prior to 13 weeks gestation, while other midwestern states, having no similar in-hospital requirement, averaged only 80% of their total abortions prior to 13 weeks gestation. (*E.g.*, Kansas, Minnesota, Nebraska and South Dakota). In 1976 Missouri accounted for 34.5% of all abortions performed prior to 13 weeks gestation within the combined states of MO, KS, MN, NE and SD; yet in the same year Missouri accounted for only 10.0% of all abortions among those combined states during the post-12 weeks gestation period. Approximately 1,499 abortions were prohibited by this in-hospital restriction in Missouri during 1976. *Center for Disease Control Abortion Surveillance, 1976,* U.S. DEPT. H.E.W., August 1978, Table 16 at 33. (Plaintiffs' Trial Exhibit 1 [hereafter "Plts. Tr. Ex. ____"], Trial Transcript 865, 866 [hereafter "T. ____"]).

In 1977, 94.1% of all abortions in Missouri were performed prior to 13 weeks gestation, while the combined states of KS, MN, NE and SD averaged only 81.9% of their total abortions prior to 13 weeks gestation. In 1977 Missouri accounted for 35.0% of all abortions performed prior to 13 weeks gestation within the combined five states; yet Missouri accounted for only 10.9% of all abortions within those combined states during the post-12 weeks gestation period. Approximately 1,389 abortions were prohibited by this in-hospital restriction in Missouri during 1977. *Center for Disease Control Abortion Surveillance, 1977,* U.S. DEPT. H.E.W., September 1979, Table 16 at 43.

In 1978, 91.5% of all abortions in Missouri were performed prior to 13 weeks gestation, while the combined states of KS, MN, NE and SD averaged only 83.7% of their total abortions prior to 13 weeks gestation. In 1978 Missouri accounted for 33.6% of all abortions performed prior to 13 weeks gestation within the combined five states; yet Missouri accounted for only 19.8% of all abortions within those combined states during the post-12 weeks gestation period. Approximately 910 abortions were prohibited by this in-hospital restriction in Missouri during 1978. *Center for Disease Control Abortion Surveillance, 1978,* U.S. DEPT. H.E.W., November 1980, Table 12 at 41. (Pltfs. Ex. 4 to Defts. Trial on Remand Exhibit A [hereafter "Tr. R. Ex. ____"], T.R. 145, 146).

In 1980 all second trimester abortions performed by the D&E method in Missouri were performed by Truman Medical Center and by plaintiff Reproductive Health Services, an out-patient facility in the St. Louis, Missouri area. (J.A. 175, Henshaw). D&E is an accepted practice for out-patient, second trimester abortion throughout the United States. It is well-recognized as the safest method and it is considered minor surgery. (J.A. 178, Eubanks).

The requirement of mandating hospitalization increases the risks of mortality and of morbidity to women by reason of:

(a) Increased anxiety through greater loss of anonymity and of privacy; and increased anxiety through exposure to a larger number of hospital personnel, who are not screened and/or selected on considerations of their personal acceptance of abortion, thereby exposing patients to adverse judgmental attitudes. These adverse factors are more controllable and occur less frequently in the clinic setting. (T.20, Widdicombe; J.A. 106-07, Kassar; J.A. 120-21, Crist; J.A. 179, Eubanks).

(b) Increased risk of infection and more serious strains of infection present in hospitals than are present in out-patient facilities. (J.A. 100, Widdicombe; T. 131, Palmer; J.A. 107-08, Kassar; J.A. 120-21, Crist; J.A. 179, Eubanks).

(c) Increased use and risks of general anesthesia in hospitals than in clinics. (J.A. 96, Widdicombe; J.A. 106-07, Kassar; J.A. 120, Crist).

(d) Travel necessary to reach a hospital, which adversely impacts women forced to leave their accustomed locales, their families, their natural support systems and their personal physicians. Moreover, travel adversely impacts the treatment of abortion complications which are not immediately present at the time of the procedure; since complication care is best delivered by the performing physician. (T.368-69, Crist; J.A. 181, Eubanks; J.A. 58-59, Cates).

(e) Increased cost burden by $150.00 to $750.00 (J.A. 96, Widdicombe), by $1,000.00 to $1,650.00 (J.A. 102, Palmer), by $1,350.00 to $1,500.00 (J.A. 121, Crist). The average cost of a second trimester, D&E abortion at plaintiff Reproductive Health Services is $260.00. (J.A. 162, Widdicombe). The prevailing out-patient D&E charge in the United States is "$250 to $300." (J.A. 96, Widdicombe).

The increased costs of in-hospital procedures, the delays incurred by reason of hospital and bed availability (J.A. 108-09, Kassar) and the relative risks can not justify this Section on the traditional medical/surgical, cost/benefit ratio evaluaton (T. 389, Kretzschmar). It is a financial burden. (J.A. 187, Eubanks).

(f) Delays engendered by restricted hospital and bed availability. (J.A. 109, Kassar).

(g) Direct interrupton of the traditional doctor-patient relationship. (T.216, Kassar; J.A. 121, Crist; J.A. 126, Kretzschmar).

(h) Direct impediment to the delivery of second trimester abortions. (T.26,28, Widdicombe; T.131, Palmer; J.A. 109, Kassar; J.A. 122, Crist; J.A. 126, Kretzschmar). Defendants' own expert Dr. Schmidt admitted that "(t)he choice of where a procedure is to be performed is traditionally the doctor's responsibility and decision." (J.A. 154).

(i) Increased anxiety increases morbidity and mortality. (J.A. 180-81, Eubanks).

Defendants' own expert witnesses did not dispute any of the above specifics of prevalence, use, infection, anesthesia, anonymity, anxiety, safety and the experience and results as contained in the literature. Rather, they merely stated their personal conclusionary opinions that all second trimester abortions should be performed in a hospital.

The impacts and encumbrances imposed by this requirement fall disproportionately upon certain classes of the abortion patient populations. The increased costs of out-of-state or across-state, in-hospital abortions had nearly eliminated the abortion option for those groups of women who disproportionately seek second trimester abortions: Teenagers and the economically disadvantaged. (T. 132-33, Palmer; T. 214-15, Kassar; T. 415, Kretzschmar; J.A. 186, Eubanks). Twenty-eight percent of plaintiff Reproductive Health Services' patients are under 18 years of age. (J.A. 95, Widdicombe). In Dr. Kretzschmar's practice, as Chair of Obstetrics and Gynecology at both Truman Medical Center and at the University of Missouri Medical School of Kansas City, 65% of the patients are under 18 years of age (J.A. 126) and in plaintiff Dr. Palmer's practice, one-third (J.A. 104).

The adverse effects upon minors, by reason of inherent delays as a result of their relative lack of sophistication and maturity was dramatically evidenced. This results from an "inability of a young woman to accept the fact that she may in fact be preg-

nant." (J.A. 97, Widdicombe). Dr. Kassar indicated that "(t)he first thing the child goes through. It can't happen to me. They deny it. They are scared. And the (*sic*) try to block it." (T. 215).

The burden and interference is also evident when one considers that in 1978, 6,990 Missouri women were forced to obtain abortions outside of the State, while only 2,380 nonresidents obtained abortions in Missouri. (A deficit exchange ratio of 3:1). (J.A. 173-74, Henshaw). In fact, the disparity was even greater due to the actual demographic considerations. (J.A. 177, Henshaw).

The D&E procedure through 15 weeks has a national mortality rate of 4 per 100,000 compared to the Missouri mortality rate for childbirth of 28 per 100,000. (J.A. 106, Kassar). The risk of D&E is 1/10 to 1/20 the risk of childbirth (J.A. 121, Crist). D&E risks equal those of childbirth when D&E is performed at 24 weeks or later (J.A. 179, Eubanks). D&E is the safest method during the first half of the second trimester (12-25 weeks or up to 18½ weeks. (T.31, Widdicombe; T.R. 110-11, Eubanks). Reports in the literature demonstrate that out-patient D&E is safer than all in-hospital non-D&E abortion procedures. (T. 74, Widdicombe; J.A. 101, 103, Palmer). "(C)ertainly, through 16 weeks, . . . D&E abortions outside of hospitals are no more dangerous than D&E abortions performed in hospitals and in many cases are cheaper and more convenient." (J.A. 63,76, Cates).

An out-patient D&E is safer for the patient than the same procedure in-hospital. (J.A. 106, T. 212, Kassar). "It is roughly twice as risky to perform it in a hospital by available statistics versus a free standing clinic." (J.A. 120, Crist). Dr. Palmer testified that "placing a patient in a hospital for a second trimester abortion opens her to more dangers than the abortion itself does." (J.A. 102). Defendants' own expert Dr. Schmidt conceded that the practice of out-patient D&E "is acceptable if it works all right." (J.A. 154). Dr. Schmidt offered no testimony of "it (not working) all right."

There was no evidence of any other Missouri statute mandating a site requirement for any other medical or surgical procedure. Defendants' own expert Dr. Nathanson readily admitted that "(t)he rates for morbidity outside of a hospital are probably no different than the rates in-hospital." (J.A. 144). The actual experience demonstrates that second trimester procedures are safer than first trimester procedures. Plaintiff Reproductive Health Services, comparing 11,190 first trimester procedures with 1,160 second trimester D&E procedures, for the period January 1980 through June 1981, found:

> Total complications by percentage rates (d) were 26.21% higher for first trimester procedures than for second trimester procedures. Total hospitalizations by percentage rates (e) were 94.12% higher for first trimester procedures than for second trimester procedures. Total complications hospitalized by percentage rates were 52.00% higher for first trimester procedures than for second trimester procedures.

Pltfs. T.R. Ex. 2, T.R. 65-66; J.A. 157-60, Widdicombe.

The experience in Louisville, Kentucky, based upon a first trimester experience of 8,465 abortions and a second trimester experience of 7,211 abortions, for the period of 1977 to date, was similar. (T.R. 130, Eubanks).

Dr. Cates in discussing a hypothetical second trimester abortion for his own wife stated, "(m)y method of choice would be a D&E procedure and having it performed in a nonhospital facility". (J.A. 50). Dr. Eubanks testified he would always elect an out-patient D&E procedure for his patients over the same procedure in a hospital. (J.A. 179).

Complications which may arise from a D&E procedure are adequately managed either in the out-patient facility or in a hospital following an appropriate transfer. (J.A. 96, Widdicombe). There is no greater likelihood of a need arising for

blood transfusion during the second trimester procedure than in the first trimester procedure. (J.A. 99, Widdicombe). The incidence of infection, in any case, arises 48-96 hours post-procedure (J.A. 100-01, Widdicombe; J.A. 117-18, Kassar), after the patient has departed "(b)y two to three days" (J.A. 117, Kassar) the facility where the abortion was performed, be it clinic or hospital (T. 72, J.A. 101, Widdicombe).

Defendants offered no testimony demonstrating any adverse effects upon patient care in the numerous jurisdictions wherein second trimester procedures are routinely performed by the D&E method at out-patient facilities, as compared to where they are routinely performed in-hospital. Plaintiffs offered a great deal of testimony based upon actual experience that, in fact, the safety experience is better under the out-patient model as opposed to the in-hospital situation.

During Dr. Eubanks' four years experience with over 7,211 cases of second trimester D&E abortions, in not a single instance of complication did the fact of the abortion being an out-patient procedure (as opposed to being performed in- hospital) adversely affect the timing, course, nature, or ultimate outcome of the treatment of that complication. (J.A. 182; T.R. 122).

While two-thirds of D&E procedures are performed outside of hospitals (J.A. 46, Cates), "D&E's performed in nonhospital settings appear to have no greater risk than those performed in hospitals." . . . "It was no safer to have their D&E procedures performed in the hospital than it was to be performed at the clinic." (J.A. 47, Cates).

Post-complication care is best rendered by the same physician who performed the abortion. (T.R. 131-33, Eubanks). There is greater likelihood of the abortion physician being the complication treating physician in the clinic situation, than where the abortion was performed in the hospital. (J.A. 58-59, Cates).

When the treatment of complications is under review, "it's the threshold of recognition of the physician that's important, rather than the availability of products." (J.A. 66, Cates). Dr. Crist who practices in Kansas indicated that "forty-five percent of my second trimesters are referred from the State of Missouri." (J.A. 124).

The requirement of in-hospital does not in any manner ensure quality care, for the quality of hospitals ranges from good to bad, as does the quality of physicians. (T.R. 36-37, Widdicombe; J.A. 74-75, Cates). A blanket in-hospital requirement after 12 weeks does not "insure any greater degree of health and safety for women." "I do not believe that D&E's performed in nonhospital settings are inherently more dangerous than those performed in hospitals." (J.A. 76; Defts. Tr.R. Ex. A, T.R. 145, 146, 119). In light of the fact that over 75% of all second trimester abortions in Missouri are performed by D&E, Dr. Cates considered the 12 week threshold of in-hospital not "to be rationally related to maternal health" and, in fact, to be "very irrational." (Defts. Tr.R. Ex. A, T.R. 145, 146, 121, 128). The fact that hospitals are better equipped to handle the complications is not "synonymous with the fact that they handle them better if the original procedure is performed there as opposed to being performed in a clinic." (T.R. 32, Widdicombe).

Although one hospital in the State of Missouri does perform D&E second trimester abortions (Truman Medical Center in Kansas City, Missouri [J.A. 103, Palmer; J.A. 112, Kassar; J.A. 51-57, Schramm; J.A. 73, Stipulation of parties]); in fact, in-hospital second trimester abortions, by any method, are not readily available in Missouri. In addition to Truman Medical Center, one other Missouri hospital reported doing one second trimester abortion (by a method other than D&E) in each of the years 1979 and 1980 and one other Missouri hospital reported doing three second trimester abortions (by a method other than D&E) in each of the years 1979 and 1980. (J.A. 170, Henshaw).

As the testimony indicated, these cases were apparently considered first trimester procedures before being commenced, but were later properly classified as second trimester procedures following the post-abortion examination of the uterine contents. (J.A. 170-71, Henshaw). (Cross-Pet. A-116 at n.3).

The Missouri abortion rate per 1,000 women is approximately one-half the national rate. (J.A. 172-73, Henshaw). The national per state percentage of total abortions performed in-hospital is nine per cent. The rate for Missouri in 1980 was seven per cent, and in 1979 (when only hospitals performed second trimester procedures) the rate was three per cent. (J.A. 171, 174, Henshaw). Of all second trimester abortions in Missouri in 1979, 540 were in-hospital and 690 were in-clinic. (J.A. 169, Henshaw). The provision by plaintiff Reproductive Health Services of second trimester D&E procedures in 1980 did not detract from the same service previously offered only in-hospital by Truman Medical Center. In fact, the volume of Truman Medical Center in 1980 increased over its 1979 volume. Reproductive Health Services drew entirely from the existing pool of unmet need. (J.A. 175, Henshaw). In 1979 only 540 second trimester abortions were performed in Missouri. In 1980 the number increased 157% to 1,390. (J.A. 169, Henshaw).

If all abortions performed by Missouri hospitals were second trimester abortions, the unmet need for such services in Missouri still would remain unsatisfied. (J.A. 174, Henshaw). The performance by a particular facility of all abortion requests made to it is in no manner synonymous with meeting the need or fulfilling total availability. (J.A. 176-77, Henshaw). Only 34% of the need in Missouri for second trimester abortions is presently being met, although this is almost three times the 13% of the need met in 1979 (when only hospitals provided such services). (J.A. 171-72, Henshaw). "(R)egulations requiring abortions being performed in hospitals * * * had the effect of limiting the availability of second-trimester procedures" (J.A.

48, Cates); for "women who had to travel are less likely to obtain abortions." (J.A. 77, Cates). In Missouri, 49% of fertile women live in counties without any abortion provider. Nationally, the same figure is 25% or less. (J.A. 174, Henshaw).

II.

The Second Physician Requirement (MO. REV. STAT., § 188.030.3)

Section 188.030.3 imposes a requirement that a second physician be in attendance at all abortions of post-viable fetuses. The testimony of plaintiffs' expert witnesses, as well as many of defendants' witnesses, was that in certain methods of abortion on viable fetuses there is absolutely no reason for a second physician to attend, because for such methods there exists no possibility of fetal survival and for other such methods the chances of fetal survival are extremely remote. (J.A. 113, Kassar; J.A. 123, Crist; J.A. 127, Kretzschmar). Defendants' own experts agreed. (J.A. 143, Nathanson; J.A. 154, Schmidt; Defts' Tr. Ex. Q at 76-77, J.A. 43, Martin). "(T)here is a greater need for a second physician in term deliveries than there are (*sic*) in the cases of abortion by prostaglandin and saline." (J.A. 124, Crist).

The cost of a second physician in attendance would be a direct burden upon the availability and delivery of abortion services (J.A. 110, Kassar; J.A. 124, Crist; J.A. 128, Kretzschmar) and would be an aberration of the traditional doctor-patient relationship. (T. 226, Kassar; J.A. 124, Crist; J.A. 128, Kretzschmar). No other Missouri statute exists requiring two doctors in attendance for any other medical or surgical procedure, no matter how grave or risky. (T. 357, Crist). Two doctors are not required either for normal childbirth or for the delivery of a premature infant. (J.A. 106, Palmer; J.A. 110, Kassar; J.A. 123-24, Crist; J.A. 127, Kretzschmar). The delivery of "premature children without the attendance in the operating

room of a second physician * * * (e)xcept in large university settings, * * * is the rule in this country." (J.A. 123-24, Crist). In fact, the newborn is the sole responsibility of the delivering obstetrician, until he or she chooses to relinquish that responsibility to the neonatologist, pediatrician or other appropriate medical personnel. (J.A. 133, Crist). No exception is made for the performance of such abortion without the second physician in attendance, although immediate emergency circumstances might well warrant the same.

III.

The Pathology Requirement
(MO. REV. STAT., § 188.047)

Section 188.047 imposes a requirement of an examination of all abortion tissue by a certified pathologist at all stages of pregnancy. No disputed testimony was given by either plaintiffs' or defendants' witnesses as to the fact that no guidance is given as to whether the required examination by the certified pathologist is to be merely a gross (visual) or a microscopic examination. (J.A. 99, Widdicombe; T. 150, Palmer; J.A. 110-11, Kassar; J.A. 124, Crist; J.A. 128, Kretzschmar; J.A. 155, Schmidt; J.A. 134-35, Smith; J.A. 150, Keitges). Normally, pathology referral is medically indicated for only 12% of abortion cases, following a thorough gross examination by the performing physician. (J.A. 97-98, T. 100, Widdicombe; J.A. 104, Palmer; J.A. 111, Kassar; J.A. 125, Crist; J.A. 128, Kretzschmar).

Plaintiffs' expert witness, Dr. J. Chandler Smith, Chairman of the Department of Pathology at the University of Missouri Medical School at Kansas City and at Truman Medical Center, testified that there are two major reasons for a gross exam: the presence of molar or other irregular tissue and the existence of an extra-uterine pregnancy. He testified that these are capably

accomplished by the performing physician's gross examination, which is as competent as a gross exam by a certified pathologist. (J.A. 135). A gross examination by the performing physician will reveal the presence or non-presence of a uterine pregnancy and/or of a blighted ovum. (J.A. 98, Widdicombe). Dr. Smith indicated that molar tissue occurs in approximately one of every 2,000 cases and an extra-uterine pregnancy in approximately one of every 250-300 cases (J.A. 135). In both situations, Dr. Smith indicated the performing physician would note the irregularity in all cases and routinely forward those samples to the pathologist. (Tr. 467-68).

All of plaintiffs' experts agreed that this Section, when evaluated on the cost/benefit ratio analysis used for evaluating the appropriateness of all medical tests, could not be justified. (J.A. 105, Palmer; J.A. 112, Kassar; T. 400, Kretzschmar). Defendants' expert pathologist Dr. Keitges admitted that many hospitals routinely do not require pathology examinations of tissue, including tonsils, hernias, hemorrhoids, *etc.* (J.A. 146). Witnesses agreed that the sending of tissue to pathology has traditionally been the province of the attending physician. (J.A. 99, Widdicombe; J.A. 105, Palmer; J.A. 111, Kassar; T. 372, Crist; J.A. 129, Kretzschmar). Defendants' expert pathologist agreed (J.A. 151, Keitges), as did defendants' expert Dr. Schmidt (T. 846). They agreed that the additional cost factor involved would substantially burden the availability and delivery of abortion services. (T. 51, Widdicombe; J.A. 105, Palmer; J.A. 111-12, Kassar; J.A. 125, Crist; J.A. 129, Kretzschmar). The cost of each examination would be $20 to $35 (J.A. 99, Widdicombe); $20 to $80 (J.A. 105, Palmer); more than $30 (J.A. 111, Kassar); "at least $40.00 per examination" (J.A. 125, Crist); "around $25.00" (J.A. 128, Kretzschmar). Defendants' expert estimated $35 or $37.50. (J.A. 151, Keitges).

This section unwarrantedly applies to all stages of pregnancy and does not require any time limits for the pathologist's ex-

amination to be conducted; thereby obviating entirely the extremely minimal reasons for the same. "(I)f I send it to the pathologist, they are going to come late and not going to help me. By the time they come back, I have already seen the complication." (J.A. 111, Kassar).

Plaintiffs' experts also testified that such a requirement was not common medical practice in abortion cases in the United States. (J.A. 99, Widdicombe; J.A. 105, Palmer). Defendants' expert Dr. Schmidt agreed. (J.A. 153). Defendants' expert pathologist Dr. Keitges conceded Dr. Smith's expertise (T. 754-55), conceded that the individual physician traditionally decides which tissue is to be forwarded to pathology (J.A. 151) and conceded that the cost/benefit ratio is an appropriate method of evaluating this Section's rationality (J.A. 151).

Dr. Crist more explicitly related the federal government's experience as reported by the Center for Disease Control, U.S. Department H.E.W. During the five year period of 1972 through 1976, when over 3,800,000 first trimester abortions were performed; only two deaths from ectopic pregnancies resulted which reasonably could have been prevented from the nationwide adoption of this Section. The cost of each life saved would have been $76,000,000.00. (J.A. 132-33, Crist). No other Missouri statute exists requiring pathology on any specific type of tissue. (T. 150, Palmer; T. 237, Kassar; T. 372-73, Crist).

IV.

The Award Of Attorneys' Fees And Costs

Defendants' score card of issues won and lost finds plaintiffs to have batted .500. (Defts. Br. 48). Not only have defendants played free and loose in keeping score, but their analysis of the importance of such wins and losses is highly questionable. (Defts. Br. 47).

Plaintiffs suggest a more accurate scoring would reflect the following.

§ 188.020 - Won - Statutory construction by the District Court awarded plaintiffs the relief sought.

§ 188.025 — Won

§ 188.028 — Lost

§ 188.030 — Won

§ 188.030.1 — Won — Statutory construction by the Appellate Court awarded plaintiffs the relief sought.

§ 188.030.2 — Won — Statutory construction by the Appellate Court awarded plaintiffs the relief sought.

§ 188.030.3 — Won

§ 188.039 — Won

§ 188.047 — Won

§ 188.052 — Won — Statutory construction by the

Appellate Court awarded plaintiffs the relief sought.

§ 188.063 — Won.

It must also be observed that with rare exception, all of both plaintiffs' and defendants' witnesses were expert witnesses; and each testified as to each challenged Section. There exists no feasible nor realistic manner in which time devoted before, during or after trial to any witnesses testimony could be accurately apportioned as to distinct issues. Nor is general preparation time, trial time or post-trial time apportionable on an issue-by-issue basis. The entire Transcript and Transcript on Remand make these conclusions self-evident.

SUMMARY OF ARGUMENT

The Applicable Standards Of Review

The clear and explicit standards for legislative restrictions on abortion established in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973) have been consistently applied for ten years. They have proven successful in practice. To alter them now in any fashion permitting greater statutory intrusion into this realm of privacy would be unwarranted and recreate catastrophic affects upon the health of women.

I.

The In-Hospital Requirement (MO. REV. STAT., § 188.025)

The in-hospital requirement for post-first trimester abortions falls by reason of defendants' utter failure to show any rational reason for its enactment. Defendants failed to demonstrate that the health considerations of women are enhanced by such a requirement and, in fact, the evidence was to the contrary. Such a requirement imposes a severe limitation on access to abortion availability by reason of the near total lack of hospital services and the increased expenses incurred.

II.

The Second Physician Requirement (MO. REV. STAT., § 188.030.3)

Requiring the presence of a second physician during the abortion of any viable fetus is irrational and overbroad, when the method of abortion utilized can not possibly result in a live birth.

III.

The Pathology Requirement (MO. REV. STAT., § 188.047)

The requirement of pathology on all abortion specimens at all stages of pregnancy is supported by neither compelling nor rational reasons. This is particularly true, since the Section does not require the type of examination calling for a pathologist's expertise, does not comport with medical practice in the field of abortion or medicine in general, increases unnecessarily the cost of the abortion and serve no justifiable medical purpose.

IV.

The Award Of Attorneys' Fees And Costs

The awards below of fees and costs were wholly consistent with the legislative history and judicial interpretations of Title 42, U.S.C., § 1988.

The allocation of fees on the basis of issues or theories won or lost does not fulfill the purposes of the Act, discourages a full and adequate prosecution of a civil rights action, and, in many cases such as the instant matter, is incapable of application by reason of the nature of the issues, the evidence adduced, witnesses called and testimony taken.

ARGUMENT

The Parties' Witnesses

Plaintiffs' expert witnesses at the initial trial were all either plaintiffs themselves or from the metropolitan Kansas City or St. Louis, Missouri areas. All had extensive experience in the provision of abortion services, both in the numbers of experiences and the length of years covering their involvement. All believed in a female patient's fundamental right, in consultation with a physician, to determine the advisability of terminating a given pregnancy based upon her individual medical circumstances, and her individual moral and religious beliefs. All believed in the freedom and discretion of the individual physician to determine in each case the methodology of delivering abortion services, based upon the particular circumstances, and the physical and psychological health needs and interests of each patient.

Plaintiffs' Expert Witnesses In Order Of Testimony

JUDITH A. WIDDICOMBE, R.N. - Executive Director since its founding in 1973 of Reproductive Health Services, the largest abortion provider in the State of Missouri; Private medical consultant; Medical/surgical clinic management specialist for Planned Parenthood Federation of America, Inc.; Past President of the National Abortion Federation; Member of the Board and Executive Committee of the National Abortion Rights Action League; Member of the American Public Health Association, the Association of Planned Parenthood Physicians, the American Association of Sex Educators, Counselors & Therapists and the Missouri Association of Public Health. (T. 5-7).

ALLEN S. PALMER, D.O. - Member of the American College of Osteopathic Obstetricians and Gynecologists, American

Osteopathic Association, St. Louis Osteopathic Society and Missouri Osteopathic Society; Practicing obstetrician and gynecologist; Teaching assistant and instructor in obstetrics and gynecology; Experienced in having performed 12,000 to 15,000 abortion prcedures. (T. 117-20).

NAIM S. KASSAR, M.D. - Board eligible for the American College of Obstetricians and Gynecologists; Licensed and practicing physician in Missouri and Kansas; Assistant Professor in Obstetrics and Gynecology at the University of Missouri Medical School at Kansas City; Author of numerous articles in the field; Experienced in having performed 7,200 first trimester abortion procedures and over 1,000 second trimester abortion procedures. (T. 199-201).

ELIZABETH M. SMITH, Ph.D. - Assistant Professor, Department of Psychiatry, Washington University Medical School; Adjunct Assistant Professor, George Warren Brown School of Social Work, Washington University; Author of numerous articles in the field; Experienced in having counseled hundreds of women with problem and/or unwanted pregnancies. (T. 288-91, 295).

ROBERT D. CRIST, M.D., Ph.D. - Faculty member of the University of Kansas School of Medicine, appointments in the Departments of Obstetrics and Gynecology and Biochemistry; Licensed physician in Kansas and Missouri; Board certified by the American College of Obstetricians and Gynecologists; Author of numerous articles in the field; Experienced in having performed 10,000 first trimester abortion procedures and 10,000 second trimester abortion procedures. (T. 326-30).

ROBERT M. KRETZSCHMAR, M.D. - Professor and Chairman, Department of Obstetrics and Gynecology at both the University of Missouri Medical School at Kansas City and at Truman Medical Center; Board certified by the American College of Obstetricians and Gynecologists; Author of numerous articles in the field; Experienced in having performed 2,000 first

trimester abortion procedures and 1,000 second trimester abortion procedures. (T. 378-81).

ENRIQUE VERA, M.D. - Board certified by the American College of Psychiatry; Associate Professor of Psychiatry at the University of Missouri Medical School at Kansas City; Associate Director of Training and Director of Emergency Services at Western Missouri Mental Health Center. (T. 442-44).

J. CHANDLER SMITH, M.D. - Chairman of the Department of Pathology at the University of Missouri Medical School at Kansas City and at Truman Medical Center; Board certified by the American College of Pathology; Author of numerous articles in the field. (T. 463-65).

WAYNE SCHRAMM - Director of the Bureau of Health Data Analysis, Missouri Center for Health Statistics, Division of Health, Missouri Department of Social Services, Jefferson City, Missouri. (T.R. 49).

STANLEY HENSHAW, Ph.D. - Senior Research Associate of The Alan Guttmacher Institute, New York City, New York and Washington, D.C. (T.R. 66).

SAMUEL G. EUBANKS, JR., M.D. - Board Certified by the American Board of Obstetrics and Gynecology; Licensed physician and surgeon in Kentucky, Ohio, Tennessee and California; Practicing obstetrician and gynecologist; Experienced in having been involved in an office practice of 15,500 first and second trimester abortions. (T.R. 108-10).

Defendants' expert witnesses were from New Orleans, Cincinnati, New York, Ottawa, Columbia, and St. Louis, as well as Kansas City. None had any extensive experience with the delivery of abortion services or with abortion patients. Most were morally opposed to abortion and most equated abortion with murder. (T. 491-92, Ketterman; T. 570-71, Petruso; T.

702, Dickey; T. 737, James). Many of the defendants' own witneses opposed the arbitrary nature of many of the challenged Sections for a variety of reasons, *infra*, and many of defendants' witnesses had difficulty understanding the intent of specific Sections, *infra*.

The Applicable Standards Of Review

The oft-quoted summation by this Honorable Court in its landmark decision of *Roe* v. *Wade*, 410 U.S. 113 (1973) is explicit and exacting as to what states may and may not do to regulate the medical procedure of abortion.

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interests in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.

Roe, supra, 410 U.S. at 164-65.

This unequivocal standard has never been altered by the High Court. Its message was repeated again and again throughout the two companion cases of *Roe, supra*, and *Doe* v. *Bolton*, 410 U.S. 179 (1973), which "of course, are to be read together." *Roe, supra*, 410 U.S. at 165. See *Roe, supra*, at 162-64 and *Doe, supra*, at 194-95.

> Georgia may . . . from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish.

Ibid.

Since 1973, various federal courts of appeal have been called upon to interpret and to apply these standards. They have done so with complete uniformity and clarity of understanding.

The Seventh Circuit has discussed in detail the nature and responsibilities of the burden in the abortion litigation context.

> It is well-settled that a regulation that interferes with the woman's right to decide whether to bear a child must be narrowly drawn to express only the legitimate State interest at stake . . . Of course, a law is not considered an interference with the pregnancy termination decision and subject to strict scrutiny simply because it concerns abortion. In *Maher* v. *Roe,* 432 U.S. 464 (1977) . . ., for example, the Supreme Court applied the rational basis test to a law that merely implemented a State's preference for childbirth over abortion without adding any "restriction on access to abortion that was not already there." 432 U.S. at 474 . . . In applying the rational basis test under those circumstances, however, the Court in *Maher* emphasized that it was not retreating from its holding in *Roe* v. *Wade:* "There is a basic difference between direct state interference with a protected activity consonant with legislative policy." *Id.* at 475 . . . Thus, to trigger strict scrutiny of S.B. 47, it is the plaintiffs' burden to demonstrate only that it is a "direct interference" with the abortion decision or imposes restrictions that did not already exist . . . The threshold question whether there is a "burden" or "direct interference" in the pregnancy termination decision requires the plaintiff merely to show the

> requisite degree of interference. If the interference is sufficiently substantial and not de minimis, the State has to show the compelling basis for the law, that is, that the burden is not "undue" or unjustifiable . . . The decisions of the Supreme Court do not permit us to substitute what is no more than a standardless reasonableness test urged by the defendants for the well-established requirement that the State justify the impact of a law on this fundamental right by a demonstrable compelling interest.

Charles v. *Carey,* 627 F.2d 772, 776-78 (7th Cir. 1980). The *Charles* concept of undue burden has been accepted by many Circuits and rejected by none. *See Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft,* 655 F.2d 848, 855 (8th Cir. 1981), *cert. granted,* 50 U.S.L.W. 3934 (May 24, 1982); *Deerfield Medical Center* v. *City of Deerfield Beach,* 661 F.2d 328, 335 (5th Cir. 1981); *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 651 F.2d 1198 (6th Cir. 1981), *cert. granted,* 50 U.S.L.W. 3934 (May 24, 1982).

In the recent decision of *Women's Medical Center of Providence, Inc.* v. *Roberts,* 530 F.Supp. 1136 (D.R.I. 1982), Chief Judge Pettine carefully and thoughtfully examined in great detail the conflicting views engendered since *Roe* and *Doe* on the extent of permissible regulation. Although lengthy, his apposite discussion is set forth in full, inasmuch as it is the most thorough and comprehensive review of the very issue which is the crux of this appeal.

The Legal Standard

> Before discussing each requirement of the Rhode Island statute, it is necessary that I establish the applicable legal standard. This standard was first established in *Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Doe* v. *Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and further expounded in *Planned Parenthood*

of Central Missouri v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), and *Harris* v. *McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). These cases hold that a woman's right to decide whether or not to terminate her pregnancy is a fundamental right, bound up with the rights of privacy implicit in the "liberty" component of the due process clause of the Fourteenth Amendment. Hence, only compelling state interests can justify any state limitations. *Roe* v. *Wade*, *supra*, 410 U.S. at 155, 93 S.Ct. at 727; *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172, 1200 (N.D.Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981). *See Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F.2d 1006, 1016 (1st Cir. 1981) ("[W]ithout deciding whether the interest asserted has been shown to be compelling, we conclude that the state has failed to establish that the [statutory provision] is 'necessary' to serve that interest.") However, certain insignificant or *de minimis* burdens on the right are permissible and will not trigger strict scrutiny of the relevant enactment. *Charles* v. *Carey*, 627 F.2d 772, 777 (7th Cir. 1980).[1]

---

[1] I agree with the Seventh Circuit that the concept of "undue burden" used by the Supreme Court in analyzing some recent cases involving alleged restrictions on the right to an abortion causes some confusion regarding the standard to be applied in cases involving first trimester restrictions. *See Charles* v. *Carey*, 627 F.2d 772, 777-78 (7th Cir. 1980). The confusion appears to stem from attempts to reconcile the position taken by the Court in *Roe* v. *Wade*, which arguably holds that there are no compelling state interests that ever justify a state-imposed burden on the right to a first trimester abortion, with the Court's position in *Danforth* that limited informed consent requirements may be imposed by the state during the first trimester, and with its position in *Maher* v. *Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) and *Harris* v. *McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), that the state may discourage indigents from exercising their right to an abortion by refusing to pay for the procedure. Contrary to the clear indications in *Wade* and *Bolton*, the Court in its later cases has allowed some state enactments that regulate the first trimester abortion decision.

(Footnote 1 continued)

Two approaches have emerged as lower federal courts have struggled with the line of Supreme Court abortion decisions. One approach focuses on some Supreme Court language to the effect that if a regulation does not "unduly burden" the first trimester decision, it will be upheld. *See Maher* v. *Roe,* 432 U.S. at 473, 97 S.Ct. at 2382; *Bellotti* v. *Baird,* 428 U.S. 132, 147, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844 (1976). Courts taking this approach conclude from this language that the first inquiry to be undertaken is whether a law "unduly burdens" a woman's right to an abortion. If this threshold determination of undue burden is met, then strict scrutiny applies; if not, the state's justification need only meet the rational relationship test. *See Akron Center for Reproductive Health, Inc.* v. *Akron,* 479 F.Supp. 1172, 1200 (N.D.Ohio), *aff'd in part, rev'd in part,* 651 F.2d 1198 (6th Cir. 1981); *Women's Community Health Center, Inc.* v. *Cohen,* 477 F.Supp. 542, 545 (D.Me.1979).

The second approach stems from a different perspective. In these cases, the courts determine whether the law or regulation imposes a significant or non-*de minimis* burden on the woman's exercise of her fundamental right. If such a burden is not imposed by the regulation, then the law need satisfy only the relaxed standard of reasonableness. However, if a sufficient degree of interference with the abortion decision can be shown, the regulation has to be supported by a compelling state interest and must be narrowly tailored to serve that interest. *See, e.g., Akron Center for Reproductive Health, Inc.* v. *Akron,* 651 F.2d 1198, 1204 (6th Cir. 1981); *Planned Parenthood League of Mass.* v. *Bellotti,* 641 F.2d 1006, 1014-15 (1st Cir. 1981); *Charles* v. *Carey,* 627 F.2d 772, 777 (7th Cir. 1980). I believe that the latter approach represents the better approach in reviewing these statutes. I am persuaded by the reasoning of the Seventh Circuit in *Charles* v. *Carey:*

> [T]he term "undue burden" defines the ultimate constitutional issue, not merely the threshold requirement for strict scrutiny. When describing specifically the burden of the party challenging a state regulation, the Supreme Court has not used the term "undue" .... The threshold question whether there is a "burden" or "direct interference" in the pregnancy termination decision requires the plaintiff merely to show the requisite degree of interference. *If the interference is sufficiently substantial and not de minimis, the State has to show the compelling basis for the law, that is, that the burden is not "undue" or unjustifiable.*
>
> 627 F.2d at 777 (citations omitted). (Emphasis supplied).

Balancing a woman's rights against the state interests, the Supreme Court has divided pregnancy into three trimesters. During the first trimester, no non-*de minimis* burdens on the abortion decision have been permitted. *See Colautti* v. *Franklin,* 439 U.S. 379, 387, 99 S.Ct. 675, 681, 58 L.Ed.2d 596 ("[U]p to the points where important state interests provide compelling justifications for intervention, 'the abortion decision in all its aspects is inherently, and primarily, a medical decision....'"). During the first three months, once the decision is made, the state cannot interfere with its effectuation, except to enhance, in a very limited and nonburdensome way, the medical aspects of the patient-physician decision-making process. *See Planned Parenthood of Central Missouri* v. *Danforth, supra,* 428 U.S. at 67, 81, 96 S.Ct. at 2840, 2846 (upholding a minimal informed consent requirement that applied to the first trimester and a record-keeping requirement that applied to all abortions regardless of trimester because the Court found "no legally significant impact or consequence on the abortion decision or on the physician-patient relationship"). When a woman reaches the second trimester of pregnancy, the state "in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways reasonably related to maternal health." *Roe* v. *Wade, supra,* 410 U.S. at 164, 93 S.Ct. at 732. Finally, the third trimester of pregnancy has been characterized by the Supreme Court, for purposes of constitutional analysis, as "viability." At this point the state "in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary" to preserve the life of the mother. *Id.* at 164-65, 93 S.Ct. at 732.

Because the Rhode Island statute does not differentiate among trimesters, the appropriate standard of review is that applicable to the first trimester. *See, e.g., Women's*

Services P.C. v. *Thone,* 483 F.Supp. 1022, 1044 (D.Neb. 1979), *aff'd per curiam,* 636 F.2d 206 (8th Cir. 1980), *vacated and remanded,* 452 U.S. 911, 101 S.Ct. 3043, 69 L.Ed.2d 414 (1981). Thus, if the statute creates a substantial, non-*de minimis* interference with a woman's right to an abortion, Rhode Island must demonstrate a compelling state interest to justify the interference. *See* note 5 *supra.*

The outside parameters of what a state may do during the first trimester have been set. For example, in *Danforth* the Supreme Court upheld the *de minimis* interference created by minimal informed consent and record keeping, which did not obstruct a meaningful physician-patient consultation and did not seek to influence the outcome of the woman's final decision. (I note, however, that the Court found that even these requirements "approach[ed] impermissible limits." *Danforth, supra,* 428 U.S. at 81, 96 S.Ct. at 2846.) Furthermore, in *Maher* v. *Roe, supra,* 432 U.S. at 473-74, 97 S.Ct. at 2382, and *Harris* v. *McRae, supra,* 448 U.S. at 315-16, 100 S.Ct. at 2687-88 the Court declared that states could constitutionally refuse to pay for both non-therapeutic and medically-necessary abortions. The Supreme Court reasoned that these kinds of budgetary decisions simply place no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.

Having analyzed these and other cases establishing the limits of state interference with the abortion decision, I find that most of the Rhode Island statute exceeds these limits. As I read the statute at issue, it clearly imposes legally significant, non-*de minimis* burdens on the right of a woman, in consultaton with her physician, to decide to terminate her pregnancy. Furthermore, the state has not shown a compelling interest to justify its intrustion.

530 F.Supp. 1103-04.

Each and every direct interference or burden mandates the application of a strict judicial scrutiny standard of review, whenever a fundamental right, such as abortion, is being impeded.

> . . . it is the character of the right, not of the limitation, which determines what standard governs the choice.

Thomas v. *Collins,* 323 U.S. 516, 530 (1945). *See Schad* v. *Borough of Mount Ephraim,* 452 U.S. 61, 68 (1981).

The need for uniformity and clarification in a major area of the law was decisively met by this Honorable Court in *Roe* and *Doe.* Those opinions have been consistently interpreted by Appellate Courts in near parallel fashion. To alter in any radical or dramatic fashion the state of the law and constitutional facets of abortion as they have been interpreted and applied for 10 years, would be injudicious and unwise. Such ruling would run opposite to the judicial rationale underlying *United States* v. *Ross,* 50 U.S.L.W. 4580 (1982), involving a different area of privacy and criminal law than the areas presently before this Honorable Court.

> It is well settled that, quite apart from the guarantee of equal protection, if a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution (it) is presumptively unconstitutional." *Mobile* v. *Bolden,* 446 U.S. 55, 76 *(plurality opinion).*

Harris v. *McRae,* 448 U.S. 297, 312 (1980).

I.

The In-Hospital Requirement (MO.REV.STAT., § 188.025)

In *Roe, supra,* this Honorable Court held that in the second trimester of pregnancy the state may regulate abortion for the reasonable protection of maternal health. This ruling was based on the finding that, at the time of the decision in 1973, second trimester abortions were as dangerous as childbirth.

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of *present medical knowledge,* is at approximately the end of the first trimester. *This is so because of the now established medical fact, . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth.* It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.

410 U.S. at 163. (Emphasis supplied).

Today, it is undisputed "present medical knowledge" that the D&E technique up to eighteen weeks is at least twice as safe as childbirth. All of plaintiffs' experts as well as many of defendants' experts acknowledged that the D&E procedure was relatively unknown and unused in the United States in 1973. (J.A. 95, Widdicombe; J.A. 120, Crist; J.A. 126, Kretzschmar). (Defendants' experts: J.A. 144, Nathanson; J.A. 154, Schmidt).

This Honorable Court in *Roe* noted the then existing position of the American Public Health Association, which recommended that second trimester abortions be performed in hospitals. *Id.* at 145. With the advent of medical advances and experience, the American Public Health Association contrary to its policy originally articulated in 1970, currently provides as its policy:

> Current data show that abortions occurring in the second trimester can be safely performed by the Dilatation and Evacuation (D and E) procedure. D and E procedures are shown to be far safer than saline or prostaglandin instillation. Requirements that all abortions after 12 weeks of gestation be performed in hospitals increase the expense and inconvenience to the woman without contributing to the safety of the procedure.

APHA Recommended Program Guide For Abortion Services (Revised 1979), AMERICAN JOURNAL OF PUBLIC HEALTH, Vol. 70, No. 6, June, 1980 at 652, 654.

The American College of Obstetricians and Gynecologists has also deemed it appropriate to eliminate their recommendation of an in-hospital requirement for second trimester procedures, originally formulated in 1974. *See Manual of Standards for Obstetrical-Gynecological Services of the American College of Obstetricians and Gynecologists* (1982), p. 16, providing for out-patient abortion services through 18 weeks.

The in-hospital second trimester requirement was deleted by Planned Parenthood Federation of America, Inc. for its 182 affiliates (T. 6, Widdicombe) in the publicaton of its *Abortion Services in Planned Parenthood Affiliates* (December 15, 1977).

The standard to be applied to this Section is whether it has the effect of "substantially limiting access to the means of effectuating that decision." *Carey* v. *Population Services International,* 431 U.S. 678, 688 (1977). The clear answer is yes.

What was found true for contraceptive providers in *Carey* is equally true for abortion providers.

> The burden is, of course, not as great as that under a total ban on distribution. Nevertheless, the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition.

431 U.S. at 689.

In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976), this Honorable Court struck down a Missouri statute, which prohibited the use of the saline abortion technique after the first trimester. This High Court strictly scrutinized

the restriction and reversed the findings of the District Court, which had concluded that the restriction was reasonably related to maternal health, since it had found two other techniques (mechanical means of inducing abortion and prostaglandin) to be safer than saline. 428 U.S. at 77.

This Honorable Court refused to defer to the Missouri legislative finding. Instead, this Court pointed to several important factors, including the wide medical acceptance of saline instillation as an abortion method, the relative unavailability of the alternative techniques and the higher risk of maternal death with the other available choices. *Id.* at 77-79. These factors said this Court, showed that the Missouri statute bore no reasonable relation to the preservation and protection of maternal health. Rather:

> The State . . . would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth. Moreover, as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed.

428 U.S. at 78-79.

This Court stressed the unavailability of prostaglandin in Missouri as central to its consideration of the effect of the regulation on maternal health.

> . . . the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge.

428 U.S. at 79.

This Court's criteria and rationale then, are entirely analogous here to the out-patient prohibition for second trimester procedures.

Defendants have utterly failed to meet their burden of proving that this restriction is narrowly tailored to promote the maternal health of women in Missouri. In fact, the proof and testimony was that this Section has in the past caused them irreparable harm. Defendants not only failed to satisfy their burden that this restriction was a narrowly tailored one, they presented no rebuttal whatsoever to plaintiffs' overwhelming documentary and testimonial evidence, other than by way of ultimate, unsubstantiated conclusions from their own witnesses. For these reasons, the Trial Court's decision voiding this Section must be affirmed.

Even defendants' experts had difficulties with this Section, Dr. Martin would have started its applicability "at thirteen weeks." (Defts. Ex. Q. at 8). Dr. Nathanson readily admitted that "(t)he rates for morbidity outside of a hospital are probably no different than the rates in-hospital." (J.A. 144).

Defendants have failed to refer this Honorable Court to a single line of testimony or shred of evidence that the in-hospital procedure has *in practice* been shown to be safer than the out-patient procedure; or a single experience in which an out-patient complication resulted in greater adverse effects upon the patient than would have occurred had the same complication arisen originally within a hospital confines. Instead, defendants unsuccessfully attempted to carry the day merely by repeating the generality that it must be safer in a hospital; a statement deceptively beguiling on its face, but grossly untrue, in fact.

The District Court expressly and specifically found:

> . . . the D&E procedure is the safest second trimester abortion technique currently available . . .

(J.A. 12).

> . . . second trimester D&E procedures are currently performed in only one hospital in Missouri.

(J.A. 12).

> . . . the expense of obtaining a second trimester D&E abortion in a hospital is significantly greater than that of obtaining the same procedure in an out-patient facility. Thus, requiring all second trimester abortions to be performed in a hospital places a financial burden on many women seeking such abortion.

(J.A. 14).

> During the time that section 188.025 was in effect in Missouri, primarily 1979, it was required that all second trimester abortions be performed in hospitals. During that period, the total number of second trimester abortion procedures performed was 540.[12]

(J.A. 14).

> In 1980, when second trimester abortions could be performed in both hospitals and out patient facilities, the total number of second trimester procedures performed in Missouri was 1390, 700 of which were performed in hospitals and 690 of which were performed in out patient facilities.[13] In 1979, when second trimester abortions could only be performed in hospitals, Dr. Henshaw testified that Missouri was meeting 13% of the perceived need for second trimester abortions in the state.[14] Alternatively, in 1980, when second trimester abortions could be and were

---

[12] . . . in 1980, when both hospitals and out patient facilities could perform second trimester abortions, the number of second trimester abortions performed by hospitals did not decrease, but rather increased.

performed in both hospitals and out patient facilities, 34% of the perceived need for second trimester abortions in Missouri was met.

(J.A. 14).

. . . (that) requiring that all second trimester abortions be performed in a hospital resulted in the performance of fewer second trimester procedures than if the hospitalization requirement was not in effect.[11]

(J.A. 15).

As a result, section 188.025 creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion.

(J.A. 15).

The Appellate Court expressly and specifically found:

In 1973, when *Roe* was written D&E was not a well-known and common means of performing second trimester abortions.

(Cross-Pet. A-61).

. . . D&E is the most used and safest procedure for second trimester abortion.

(Cross Pet. A-116).

. . . nonhospital second trimester D&E procedures are no more dangerous to maternal health than hospitalized procedures.

---

[11] In 1979, when second trimester abortions were only allowed in hospitals, 3.4% of all abortions performed in Missouri were second trimester procedures. This compared with a national average of 9%. In 1980, when second trimester abortions could be and were performed in both hospitals and out patient facilities, 7.9% of all abortions performed in Missouri were second trimester procedures.

(Cross Pet. A-119).

In the same appropriate manner that the Appellate Court deferred to the District Court in "an evaluation of the relative weight to be given the testimony of the experts" or "the credibility of the experts" (Cross Pet. A-66) and by reason that "the district court's finding is not clearly erroneous" (Cross Pet. A-119); this Honorable Court should defer and pay full respect to the findings of the Appellate Court and District Court below. The Appellate Court below faithfully adhered to the directions of this Honorable Court in *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 50 U.S.L.W. 4592, 4596 at n.20 (June 1, 1982) and in *Pullman-Standard, a division of Pullman, Incorporated* v. *Swint*, 50 U.S.L.W. 4425, 4430 at n.22 (April 27, 1982).

This Honorable Court's observations in *Inwood Laboratories, Inc.* and in *Pullman-Standard*, are particularly applicable here.

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman, supra, at 4429.

...An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."

Inwood Laboratories, Inc., supra, at 4595, 4596.

> The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts.

Rogers v. *Lodge*, 50 U.S.L.W. 5041, 5042 (July 1, 1982).

Other courts which have reviewed identical sections after full evidentiary proceedings have reached identical conclusions. *See Margaret S.* v. *Edwards*, 488 F.Supp. 181, 191-96 (E.D. La. 1980); and *Wolfe* v. *Stumbo*, 519 F.Supp. 22 (W.D.Ky. 1980), *remanded*, ____ F.2d ____ (6th Cir. September 17, 1981). As noted by Chief Judge Allen:

> The cases upon which the defendants rely, such as *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F.Supp. 894 (N.D.Ind.1980), are cases that this Court respectfully disagrees with, since they are based upon a misconception of the holding in *Roe* v. *Wade, supra*. The writers of those opinions failed to consider that the Supreme Court specifically held as early as 1973 in *Roe* v. *Wade, supra*, that medical knowledge is not a static thing, and that as medical knowledge and new techniques are evolved, the first trimester limitations may, in some instances, not be controlling. The *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen, supra*, case held that it was bound by the language of *Roe* v. *Wade, supra*, and, that in effect it was graven in stone. This completely overlooks the Supreme Court's reliance on improvements in medical techniques and skills which were involved in the Supreme Court's invalidating the saline instillation legislation in *Planned Parenthood* v. *Danforth, supra*.

Wolfe, supra, at 26. See Charles v. *Carey*, 627 F.2d 772 (7th Cir. 1980), *preliminary injunction affirmed.*

Although the Sixth Circuit in *Akron Center for Reproductive Health, Inc.* upheld a similar requirement by reason of its

misplaced reliance upon *Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, 451 U.S. 934 (1981), it was quick to note that in reviewing the opinions in *Planned Parenthood Association of Kansas City, Missouri, Inc.* and *Margaret S.* that "(t)he rationale of these decisions appears persuasive." 651 F.2d at 1210.

The Sixth Circuit's reliance upon *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F.Supp. 894 (N.D. Ind. 1980), *summarily affirmed* sub nom. *Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, 451 U.S. 935, (1981).

Initially, it must be noted that the Eighth Circuit in *Planned Parenthood Association of Kansas City, Missouri, Inc.*, while noting the summary affirmance by this Honorable Court in *Gary-Northwest, supra,* did not find the same to be decisive or precedential on the issue of an in-hospital requirement for second trimester abortions. (Cross Pet. A-58, A-61).

The District Court's opinion in *Gary-Northwest* was not a ruling upon the merits, but merely a denial of an applicaton for a preliminary injunction against the operation of an in-hospital requirement for second trimester abortions. This is abundantly clear from various language in the District Court's opinion.

> The case lay dormant until February 21, 1980, when the plaintiffs filed a petition for a hearing on the application of Mary Roe for preliminary and permanent injunctive relief against the enforcement of the Indiana abortion statute's hospitalization requirement for all second trimester abortions.

Gary-Northwest, supra, 496 F.Supp. at 896.

> Even if the plaintiffs' legal theory was accurate, the plaintiffs would have failed to justify a *preliminary injunction.*
>
> While this Court would be required to consider all relevant factors in deciding whether to exercise its discretion in favor of granting a *preliminary injunction,* the traditional

> standard for granting a *preliminary injunction* requires the petition to show (1) irreparable injury and (2) a likelihood of success on the merits. . . . The petition for a *preliminary injunction* is brought on behalf of women in their second trimester of pregnancy . . .

Id. at 902. (Emphasis supplied).

> The evidence produced at the hearing was insufficient to persuade this Court that the plaintiff would likely succeed
> * * *
>
> Thus, even if the plaintiffs' legal theory was accurate, the plaintiffs would have failed to justify a *preliminary injunction.*

Id. at 903. (Emphasis supplied).

The *Jurisdictional Statement* in *Gary-Northwest* (No. 80-1275), was docketed in this Court on January 27, 1981. On April 27, 1981, this Honorable Court, without formal decision, entered an order providing *in full* as follows:

> The judgment is affirmed. Justice Brennan, Justice Marshall and Justice Blackmun would note probable jurisdiction and set the case for oral argument.

451 U.S. 934 (1981).

The three questions presented were primarily procedural in nature, and not substantive. The first issue concerned the characterization of a motion as a Federal Rules of Civil Procedure No. 60(b) motion. The second contended that a full hearing on the merits was required. The third issue questioned whether the District Court had abused its discretion in refusing to issue a *preliminary injunction.* Only one conclusion can be drawn from this Court's summary affirmance on these three questions: The Court was satisfied that all procedural requirements had been met by the District Court below.

The *Jurisdictional Statement* is deemed the sole, appropriate source for determining the exact nature and essence of the issues presented to and decided by this Court.

> Summary affirmances . . . without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions *on the precise issues presented and necessarily decided* by those actions.

Mandel v. *Bradley,* 432 U.S. 173, 176 (1977). *See Illinois State Board of Elections* v. *Socialist Workers Party,* 440 U.S. 173, 182 (1979); and, *Gibson* v. *Berryhill,* 411 U.S. 564, 576 (1973).

None of the three issues presented to this Court in *Gary-Northwest* directly addressed the *merits* of the constitutionality of a second trimester, in-hospital requirement. Even the third issue concerning the alleged abuse of discretion in refusing to issue a preliminary injunction is not in any manner the same issue as a decision on the merits.

The procedural history of *Gary-Northwest,* amply demonstrates that the District Court denied a motion for *preliminary injunctive* relief. The appeal to this Court could only have been and was, in fact, from that judgment. This Honorable Court's summary affirmance can only be read, at most, as approval of such denial of *preliminary relief.* At least, it may be read as approving five years later the District Court's denial of the preliminary injunction, originally denied in 1975.

A case decided by this Court two days after *Gary-Northwest* emphasized the distinctly different legal issues involved between the granting of preliminary and of permanent injunctions. *University of Texas* v. *Camenisch,* 451 U.S. 390 (1981). This Court unanimously rejected out-of-hand a suggestion that a determination of the likelihood of success on the merits was tantamount to a decision on the underlying merits.

> This reasoning fails, however, because it improperly equates "likelihood of success" with "success," and what is more important, because it ignores the significant procedural differences between preliminary and permanent injunction.
>
> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing. . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. . . . In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.

451 U.S. at 394-95.

The precedential weight of *Gary-Northwest* is particularly weak, because this Court contrary to its custom did not cite a single case controlling the decision. If this Court had intended to *uphold* a second trimester in-hospital requirement on the basis of *dictum* in *Roe* v. *Wade,* 410 U.S. 113 (1973), surely it would have cited to its previous opinion. However, this it failed to do.

At least twice before in abortion related cases, this Honorable Court has summarily affirmed the decision of a lower court, citing the controlling case in support of its decision. *See Gerstein* v. *Coe,* 428 U.S. 901 (1976), *affirming,* 517 F.2d 787 (5th Cir. 1975); and, *Franklin* v. *Fitzpatrick,* 428 U.S. 901 (1976), *affirming,* 401 F.Supp. 554 (E.D.Pa. 1975). In both instances, the Supreme Court cited *Planned Parenthood of Central Missouri*

v. *Danforth,* 428 U.S. 52 (1976), indicating that the High Court considered the issues resolved by *Danforth. See Mahoning Women's Center* v. *Hunter,* 447 U.S. 918 (1980), *vacating and remanding,* 610 F.2d 456, 461 at n.11 (6th Cir. 1979). This Court granted certiorari, then vacated and remanded an abortion clinic regulation case on the attorneys' fee issue, citing two of its recent decisions on attorneys' fees.

Given the absence of a similar controlling citation in the summary affirmance of *Gary-Northwest,* the affirmance has little, if any, precedential value. This Honorable Court should undertake an independent review of the merits.

The legal import of summary affirmances has in recent years waned significantly.This Honorable Court unanimously articulated its current view of summary affirmances in *Illinois State Board of Elections* v. *Socialist Workers Party,* 440 U.S. 173 (1979), by reasoning:

> . . . that summary affirmances have considerably less precedential value than an opinion on the merits. See *Edelman* v. *Jordan,* 415 U.S. 651, 671 (1974). As Mr. Chief Justice Burger observed in *Fusari* v. *Steinberg,* 419 U.S. 379, 392 (1975) (concurring opinion), "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."

440 U.S. at 180-81.

> As we stated in *Mandel* v. *Bradley,* 432 U.S. 173, 176 (1977), the precedential effect of a summary affirmance can extend no farther than "*the precise issues presented and necessarily decided by those actions.*" A summary disposition affirms only the judgment of the court below, *ibid.,* quoting *Fusari* v. *Steinberg, supra,* at 391-392, (Burger, C.J., concurring), and *no more may be read into our action than was essential to sustain that judgment.* * * *

> Questions which "merely lurk in the record," * * * are not resolved, and no resolution of them may be inferred.

440 U.S. at 182-83. (Emphasis supplied).

As this Court noted in *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977):

> Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance *may not be gleaned solely from the opinion below.*

(Emphasis supplied).

As manifestly evidenced: (1) by the "Questions Presented," (2) by the lack of any hearing on the merits by the District Court as to the constitutionality of an in-hospital, post-first trimester abortion requirement and (3) by the complete absence of any ruling by the District Court on the merits of such a requirement; this Honorable Court's summary affirmance, finding that the District Court did not abuse its discretion in refusing to issue a preliminary and interlocutory injunction in *Gary-Northwest* is neither binding, of precedential value nor persuasive on the similar issue now before this Honorable Court.

In *Margaret S.*, Judge Collins noting a study by the U.S. Department of H.E.W. that "operator skill is the critical factor in predicting risk of morbidity and mortality associated with abortion," concluded that:

> It would not promote maternal welfare to compel women to obtain post-first trimester abortions in hospitals, if they were available, where the doctors are almost totally inexperienced, rather than to allow women to benefit from the clinic doctor's expertise.

488 F.Supp. 195 at n.40.

This Honorable Court in *Planned Parenthood of Central Missouri* properly determined that "it was incumbent upon ap-

pellees to show that at the time of trial in 1974 prostaglandin was available." 428 U.S. at 77 at n.12. In the instant case, the Appellate Court similarly held that:

> If the district court finds the hospital requirement constitutes a direct interference with the woman's decision to have an abortion the court must then determine whether Missouri's requirement reasonably relates to the protection of the woman's health. *The State, in meeting this burden,* must show that nonhospitalized D&E can reasonably be considered more dangerous than hospital procedures, including hospitalized D&E. *It must also show* that the methods that it argues are as safe or safer than nonhospitalized D&E are actually available to Missouri women.

Cross-Pet. A-64. (Emphasis supplied).

Abortion is basically a medical procedure, particularly at the post-12 week gestation period. Determination of the appropriate medical setting and conditions is best left to the performing physician, subject in the unlikely event of abuse to "judicial and intra-professional" monitoring (*Roe,* 410 U.S. at 166) or to "professional censure and deprivation of . . . license." *Doe,* 410 U.S. at 199.

The relative safety of abortion compared to childbirth has increased since this Honorable Court's observation "of the now-established medical fact ... that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Roe,* 410 U.S. at 163.

> At eight or fewer weeks' gestation, when more than half the procedures are performed, the risk of death from abortion was more than 20 times lower than that of childbearing. This difference declines as gestational age increases, but abortion remains the safer procedure with respect to the woman's life at gestational ages at least up through 16 weeks.

Cates, *et al., Mortality from Abortion and Childbirth,* THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, Vol. 248, No.2, July 9, 1982, pp. 188, 191.

The absolute arbitrariness of mandating all abortions, regardless of method, safety or other extenuating circumstances, to be performed in a hospital at a fixed stage of gestation, is constitutionally infirm.

III.

The Second Physician Requirement (MO.REV.STAT., § 188.030.3)

The requirement of this subsection that two doctors be in attendance throughout the abortion procedure is impractical, unnecessary, and burdensome. The techniques of terminating a viable pregnancy late in term often extends over many hours or even days. Requiring two doctors to be present not only strains medical resources, but places an enormous financial burden directly upon the woman seeking to terminate a pregnancy. (J.A. 127, Kretzschmar).

This Honorable Court in considering the regulation of medical practice at the stage of viability has reaffirmed its 1973 holding.

> Roe stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out. We indicated that up to the points where important state interests provide *compelling* justifications for intervention, "the abortion decision in all its aspects is inherently and primarily, a medical decision," *id.*, at 166, and we added that if this privilege were abused, "the usual remedies, judicial and intra-professional, are available." Ibid.

Colautti v. *Franklin,* 439 U.S. 379, 387 (1979).

No compelling reason has been so demonstrated by defendants nor are there any reasons that the remedies suggested by this Court are not adequate to cure any breaches of medical or professional duty.

The imposition of a second physician, in situations where not the slightest possibility of the additional physician's presence or *raison d'etre* of the Section being realized, is neither a reasonable regulation nor a factor contributing to maternal health. (J.A. 128, Kretzschmar). *Roe,* 410 U.S. at 164. Two physician requirements relating to abortion have previously been invalidated. *Doe,* 410 U.S. at 198-200.

> Although the presence of a second physician to care for the child born as a result of a post-viability abortion certainly may further the state's interest in the protection of potential life, the attendance of a second physician during an abortion procedure which holds no possibility of fetal survival does not further that interest. The two-physician regulation is therefore overbroad and invalid on that basis.

Planned Parenthood Association of Kansas City, Missouri, Inc., (Cross Pet. A-27).

Contrary to defendants assertion that only Dr. Crist performed D&Es subsequent to viability (Defts. Br. 41), Dr. Kassar also performed these procedures, as found by the District Court. (Cross-Pet. A-18).

IV.

The Pathology Requirement (MO.REV.STAT., § 188.047)

The standards imposed by the First Circuit in *Baird* v. *Department of Public Health of the Commonwealth of Massachusetts,* 599 F.2d 1098, 1102 (1st Cir. 1979), and the Eighth Circuit in *Hodgson* v. *Lawson,* 542 F.2d 1350, 1353 (8th

Cir. 1976) and in *Freiman* v. *Ashcroft*, 584 F.2d 247, 251 (8th Cir. 1978), *summarily affirmed*, 440 U.S. 941 (1979) require that this Section be voided by reason of its encumbering effect upon the abortion decision, without any compelling state justification. Not only must this Section be stricken for its failure to exclude the first trimester period from its purview, but it is not even sustainable as a post-first trimester requirement, by reason of its utter failure to constitute a reasonable regulation for purposes of maternal health.

The only rationale for this Section's enactment is the *additional expense* of a pathology report on abortion at all stages of pregnancy, thereby increasing significantly the cost of the procedure and concomitantly decreasing its availability to women of limited resources.

As the Appellate Court observed:

> A "gross" examination is one unaided by a microscope. Pathologists may perform a gross examination or a microscopic examination if they feel it is necessary. This statute does not specify which type of examination the pathologist is to perform. Dr. J. Chandler Smith, Chairman of the Pathology Department at the University of Missouri Medical School, testified that with respect to abortions, a non-pathologist physician is just as capable of performing an adequate gross examination as is a pathologist, and that the abnormalities which are of concern are readily identifiable.

(Cross Pet. A-96 at n.37).

IV.

The Award Of Attorneys' Fees And Costs

Plaintiffs note this is the sole issue before this Honorable Court in *Hensley* v. *Eckerhart*, No. 81-1244, *cert. granted*, 50 U.S.L.W. 3695 (March 1, 1982).

Title 42, U.S.C., §1988 is a broad Congressional remedy mandating courts to award to a prevailing civil rights litigant "a reasonable attorney's fee as part of the costs." Accompanying that statute is Congressional legislative history providing detailed and precise guidance as to the application of the remedy. The legislative history of the Fees Act is remarkably replete and includes both a Senate Report, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976) and a House Report, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976). Both reports have been authoritatively cited by this Honorable Court. *See Maher* v. *Gagne,* 448 U.S. 122 (1980); *Hanrahan* v. *Hampton,* 446 U.S. 754 (1980); *Hutto* v. *Finney,* 437 U.S. 678 (1978).

In the legislative history of the Act, Congress expressly stated the appropriate standard for computation of a reasonable attorney's fee: "[i]n computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, '*for all time reasonably expended on a matter,*' " S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (quoting *Davis* v. *County of Los Angeles,* 8 E.P.D. ¶9444 [C.D. Cal. 1974]) (emphasis added). Congress further indicated that the standard had been correctly applied in *Davis* v. *County of Los Angeles, supra,* 8 E.P.D. ¶9044 and in *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974).

Most Circuits have rejected a proportionality approach. *Lamphere* v. *Brown University,* 610 F.2d 46, 47 (1st Cir. 1979); *Seigal* v. *Merrick,* 619 F.2d 160, 164-65 (2nd Cir. 1980) (rejecting a proportionality approach to other complex federal litigation); *Jones* v. *Diamond,* 636 F.2d 1364, 1382 (5th Cir. 1981); *Northcross* v. *Board of Education of Memphis City Schools,* 611 F.2d 624, 636 (6th Cir. 1979); *Sherkow* v. *State of Wisconsin,* 630 F.2d 498, 504-05 (7th Cir. 1980); *Reproductive Health Services* v. *Freeman,* 614 F.2d 585, 600 (8th Cir. 1980); *Seattle School District No. 1* v. *The State of Washington,* 633 F.2d 1338, 1349 (9th Cir. 1980); *Littlefield* v. *Deland,* 641 F.2d 729, 732-33 (10th Cir. 1981); *Copeland* v. *Marshall,* 641 F.2d 880, 892 at n.18 (D.C. Cir. 1980).

Typical of the Circuits' reasoning is the holding in *Littlefield, supra.*

> . . . the clear intent of Congress in § 1988 was that the trial court award attorney's fees sufficient to attract and fully to compensate competent counsel. We stated further that attorney's fes should not be awarded for the pursuit of any frivolous issues or issues asserted in bad faith, but that they may be awarded for work upon issues of fact or law upon which plaintiff ultimately did not prevail so long as they were reasonably calculated to promote the client's interest.

641 F.2d at 733.

CONCLUSION

Since the prevailing legalization of aborton in 1973, under the aegis of *Roe* and *Doe,* abortion rates have increased up to 1980. In 1980, such rates peaked and subsequently have stabilized. Henshaw, *et al., Abortion Services in The United States, 1979 and 1980,* FAMILY PLANNING PERSPECTIVES, Vol. 14, No. 1, Jan./Feb. 1982.

Less than subtle efforts by politicians to satisfy misperceived constituent desires must not be condoned at the expense of constitutional guarantees and women's health; regardless of whether attempted under the guise of promoting childbirth or health concerns. The delivery of abortion services, in manners consistent with the free exercise of the attending physician's best medical judgment has been accomplished remarkably well.

The grant of constitutional credence to spurious efforts parading under a banner of maternal health can only produce the opposite and disastrous results of increased morbidity and mortality, associated historically with the denial of access to legal and safe abortions.

Repeated statutory efforts to undermine the solid wall of judicial resistance to the denial of a woman's and her physician's right to jointly decide on abortion, can not be allowed to succeed through annual legislative erosion or judicial attrition. The courage to act in a decisive manner, consistent with *Roe, Doe,* and their progeny is urged upon this Honorable Court.

This denial of access to the full enjoyment of constitutional rights has been encouraged by legislative interference, of which the challenged Sections here are sadly typical. The words of this Honorable Court many years ago, today still ring true,

> (C)onstitutional rights . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted "ingeniously or ingenuously."

Cooper v. *Aaron,* 358 U.S. 1, 17 (1958).

WHEREFORE, Respondents pray that the judgment of the Eighth Circuit Court of Appeals, declaring Missouri Revised Statutes, §§ 188.025, 188.030.3 and 188.047 unconstitutional and awarding to Respondents their reasonable attorneys' fees and costs, be affirmed and for such further orders as this Honorable Court deems appropriate.

Respectfully submitted,

FRANK SUSMAN
BARBARA L. BERAN
SUSMAN, SCHERMER,
RIMMEL & PARKER
Aragon Place - Tenth Floor
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300

Attorneys for Respondents

MOTION FILED
JUL 30 1982

No. 81-1623

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN ASHCROFT, Attorney General of the State of Missouri, and **RALPH L. MARTIN**, Prosecuting Attorney of Jackson County, Missouri,

Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

DENNIS J. HORAN
VICTOR G. ROSENBLUM
PATRICK A. TRUEMAN
THOMAS J. MARZEN
MAURA K. QUINLAN
230 N. Michigan—Suite 915
Chicago, IL 60601
312/263-5029

Attorneys for Americans United for Life

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1623

JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,

Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF AMERICANS UNITED FOR LIFE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Americans United for Life hereby respectfully moves for leave to file the attached brief amicus curiae in support of petitioners in this case. Written consent of the petitioners has been obtained and filed with the Clerk of this Court. The consent of the attorney for respondents was requested but refused.

Americans United for Life (AUL) is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of Americans United for Life is located in Chicago, Illinois. AUL is supported by thousands of Americans from every state of the union.

This case, like others presently to be considered by this Court, involves consideration of several broad areas of abortion regulation, including the health regulation of first trimester abortions (specifically through the requirement of pathology reports), the health regulation of post-first trimester abortions (specifically through the hospitalization requirement), and the protection of live-born children in post-viability abortions (specifically through the requirement that a second physician attend the procedure). This Court's decision will have a profound effect nationally on the validity of abortion regulations, and thus is of central importance to the class of unborn children, as well as the class of children aborted alive, all of whose interests AUL seeks to promote.

The arguments offered by AUL are independent of those suggested in petitioners' cross-petition for a writ of certiorari, and if accepted by this Court, would be dispositive of this case.

Respectfully submitted,

DENNIS J. HORAN
VICTOR G. ROSENBLUM
PATRICK A. TRUEMAN
THOMAS J. MARZEN
MAURA K. QUINLAN
230 N. Michigan—Suite 915
Chicago, IL 60601
312/263-5029

Attorneys for Americans United for Life

TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of the Amicus 1

Summary of Argument 2

Argument 5

I. Strict Scrutiny Is Not The Appropriate Standard Of Review For The Challenged Provisions 5

A. Strict Scrutiny Is Only Appropriate When Legislation Substantially Burdens the Woman's Freedom to Decide 5

B. Strict Scrutiny May Not Be Invoked Merely Because Abortion Is Treated Differently Than Other Medical Procedures 7

C. The Regulations at Issue Do Not Substantially Burden the Woman's Freedom to Decide: They Rationally Relate to Legitimate State Interests 9

II. Even Under Strict Scrutiny Analysis, The Provisions Are Constitutional 13

A. The State's Compelling Interest in the Life of Infant Persons Justifies the Second Physician Requirement 14

1. The State Has a Compelling Interest in Actual Human Life 14

PAGE

2. The Second Physician Requirement Is Narrowly Drawn 15

3. The Requirement of a Second Physician Is Not Overbroad: An Abandoned D & E Procedure Might Produce a Live Birth 16

B. The State's Compelling Interest in Maternal Health Justifies the Pathology Report and Hospitalization Requirements 19

III. Conclusion 27

Appendix ..... App. 1

TABLE OF AUTHORITIES

Cases

PAGE

Bellotti v. Baird, 428 U.S. 132 (1976) 8

Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II) 6, 8, 10, 22

Carey v. Population Services International, 431 U.S. 678 (1977) 5-6

Connecticut v. Menillo, 423 U.S. 9 (1975) 3, 6, 9, 11, 19-21

Dandridge v. Williams, 397 U.S. 471 (1970) 9

Doe v. Bolton, 410 U.S. 179 (1973) 20

Harris v. McRae, 448 U.S. 297 (1980) 2, 8, 11, 14, 19

Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976) 7

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 9

Maher v. Roe, 432 U.S. 464 (1977) 5, 7-8, 10

McGowan v. Maryland, 366 U.S. 420 (1961) 8

Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, No. 79-4142-CV-C-H (W.D. Mo. Oct. 2, 1981) 24

Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) ..7,9, 12, 24

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) .....*passim*

Roe v. Wade, 410 U.S. 113 (1973) .....*passim*

Whalen v. Roe, 429 U.S. 589 (1977) 6

Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) 7

Other Authorities

PAGE

Benson, R., Handbook of Obstetrics and Gynecology (7th ed. 1980) ..... App. 4

Burnhill, Reducing the Morbidity of Vacuum Aspiration Abortion, in Pregnancy Termination 146 (1979) ..... App. 3

Cates, Jr., Schulz, Gold & Tyler, Jr., Complications of Surgical Evacuation Procedures for Abortions After 12 Weeks' Gestation, in Pregnancy Termination 206 (1979) 17-18, 25-26

Cates, Jr., Schulz & Grimes, Dilatation and Evacuation for Induced Abortion in Developing Countries: Advantages and Disadvantages, 11 Stud. Fam. Plan. 128 (1980) 26

Centers for Disease Control, Annual Summary 1978 (1980) 24-25

Chicago Sun-Times, The Abortion Profiteers 1978 (special reprint) 21-22

Gangai, An unusual surgical injury to the ureter, 109 J. Urology 32 (1973) ..... App. 2

Gordon, Cervicovaginal fistula as a result of saline abortion, 112 Am. J. Obstet. Gynecol. 578 (1972) ..... App. 3

Grimes & Cates, Jr., abortion: methods and complications in Human Reproduction, 796 (1980) ..... App. 1, 3

Grimes & Cates, Jr., Fatal uterine rupture during oxytocin-augmented saline abortion, 130 Am. J. Obstet. Gynecol. 591 (1978) ..... App. 3

Lowensohn & Hibbard, Laceration of the ascending branch of the uterine artery: A complication of therapeutic abortion, 118 Am. J. Obstet. Gynecol. 36 (1974) 17

PAGE

McDonald & Aaro, Medical Complications of Induced Abortion, 67 S. Med. J. 560 (1974) ..... App. 1

Merck Manual (13th ed. 1977) ..... 18, App. 5

National Center for Health Statistics, Hospital Discharge Survey Data, 1970-1976 (1972-1978) ..... App. 4

Peterson, Dilatation and Evacuation: Patient Evaluation and Surgical Techniques, in Pregnancy Termination 188 (1979) ..... App. 3

Rous, Major & Bordon, Rupture of the bladder secondary to uterine vacuum curettage: A case report and review of the literature, 106 J. Urology 685 (1971) ..... App. 2

Rubin, Cates, Jr., Gold, Rochat & Tyler, Jr., Fatal Ectopic Pregnancy After Attempted Legal Induced Abortion, 244 J.A.M.A. 1705 (1980) ..... App. 4

Second Trimester Abortion: A Symposium by Correspondence, 16 J. Reprod. Med. 47 (1976) 25

Walton, Immediate Morbidity on Large Abortion Service, 72 N.Y. St. J. Med. 919 (1972) ..... App. 3

Watson, Urologic Complications of Legal Abortion, in New Perspectives on Human Abortion 135 (1981) App. 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1623

JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,

Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

Americans United for Life (AUL) is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of Americans United for Life is located in Chicago, Illinois. AUL is supported by thousands of Americans from every state of the union.

The Board of Directors and Officers of Americans United for Life include the following:

OFFICERS

Chairman
DENNIS J. HORAN, ESQ.

Vice Chairmen
ERMA CLARDY CRAVEN
PROF. VICTOR G. ROSENBLUM

Secretary-Treasurer
JOSEPH R. STANTON, M.D.

Executive Director
STEVEN R. VALENTINE

BOARD OF DIRECTORS

JOHN E. ARCHIBOLD, ESQ.
Denver, Colorado

REV. CHARLES CARROLL
Episcopal Diocese of Colorado

ERMA CLARDY CRAVEN
Minneapolis, Minnesota

PROF. EUGENE F. DIAMOND, M.D.
Pediatrics
Loyola University, Chicago

PROF. ARTHUR J. DYCK
Population Ethics
Harvard University

JOHN F. HILLABRAND, M.D.
Toledo, Ohio

DENNIS J. HORAN, ESQ.
Chicago, Illinois

HENRY J. HYDE, ESQ.
Member of Congress

MILDRED F. JEFFERSON, M.D.
Boston, Massachusetts

LORE MAIER
Toledo, Ohio

KENNETH M. MITZNER, PH.D.
Los Angeles, California

PROF. JOHN T. NOONAN
Law
University of California

DR. JACOB A. O. PREUS,
Former President
The Lutheran Church
Missouri Synod

PROF. PAUL RAMSEY
Department of Religion
Princeton University

HERBERT RATNER, M.D.
Child & Family Quarterly
Oak Park, Illinois

PROF. VICTOR G. ROSENBLUM
Law-Political Science
Northwestern University

JOSEPH R. STANTON, M.D.
Boston, Massachusetts

PROF. GEORGE H. WILLIAMS
Divinity - Church History
Harvard University

JASPER F. WILLIAMS, SR., M.D.
Obstetrics - Gynecology

PROF. WILL HERBERG
Philosophy and Culture
Drew University
1971 - 1977

PROF. DAVID W. LOUISELL
Law
University of California
1975 - 1977

This case, like others presently to be considered by this Court, involves consideration of several broad areas of abortion regulation, including the health regulation of first trimester abortions (specifically through the requirement of pathology reports), the health regulation of post-first trimester abortions (specifically through the hospitalization requirement), and the protection of live-born children in post-viability abortions (specifically through the requirement that a second physician attend the procedure). This Court's decision will have a profound effect nationally on the validity of abortion regulations, and thus is of central importance to the class of unborn children, as well as the class of children aborted alive, all of whose interests AUL seeks to promote.

SUMMARY OF ARGUMENT

The woman's fundamental right to decide to terminate her pregnancy does not require strict scrutiny of all legislation that has any effect on abortion. Strict scrutiny applies only to regulations which substantially burden the woman in the exercise of her right. *Harris* v. *McRae,* 448 U.S. 297, 314 (1980).

Nor does the special treatment of abortion procedures require strict equal protection analysis. *Id.* at 422. Only regulations which prohibit or virtually prohibit abortions or which provide a third party with a blanket veto trigger strict scrutiny by impinging on the right to abortion.

A requirement that a second physician attend the abortion of a viable child is primarily a child care regulation, and only affects abortion indirectly by slightly raising the cost. Thus, the burden on the right is insubstantial, and the regulation must only survive the rational basis test.

Children aborted alive are full persons under the law. Thus, a second doctor provision furthers the ultimate state interest—protection of the lives of its citizens—and sur-

vives rational scrutiny. Further, this vital state interest would justify the provision under strict scrutiny analysis. Since any post-viability abortion can result in a live birth —even a D & E, which might be abandoned in the event of an unanticipated maternal complication, thus allowing the possibility of infant survival—it is only proper that the state provide adequate safeguards for its citizens aborted alive.

The insignificant increased abortion cost resulting from the pathology report requirement does not impinge on the woman's right. Pathology reports are an efficient means of reducing maternal mortality. Such a requirement would thus further a legitimate state interest and survive rational scrutiny.

Even under strict scrutiny, the pathology report requirement is constitutional. The state has a compelling interest in providing basic care conditions ensuring maximum safety for the woman having an abortion at any stage of pregnancy. *Connecticut* v. *Menillo,* 423 U.S. 9, 10-11 (1975). Pathology reports directly reduce maternal mortality at only a minor increased cost and thus serve the state's compelling interest in maternal health. *Roe* v. *Wade,* 410 U.S. at 163. Furthermore, the requirement is especially necessary in order to combat abusive practices in abortion clinics. Pathology reporting essentially safeguards the woman in the exercise of her right, and hence survives strict scrutiny.

The post-first trimester hospitalization requirement neither prohibits abortion nor provides for a third-party veto. Strict scrutiny is, therefore, inappropriate. By providing an environment especially conducive to maternal safety, the hospitalization requirement furthers the state interest in maternal health and survives rational scrutiny.

Should this Court apply strict scrutiny, the hospitalization requirement remains constitutional. Complication rates for abortion increase dramatically after the first trimester. Hospitals possess such vital facilities as blood banks and intensive care units available on a 24-hour basis. This allows for maximum treatment capacities, and a hospitalization requirement thus directly furthers the staate's compelling interest in maternal life and health.

The abortion regulations at issue before this Court are well within constitution limits, and represent the state's pursuit of legitimate, indeed compelling interests. They must be upheld.

ARGUMENT

I.

STRICT SCRUTINY IS NOT THE APPROPRIATE STANDARD OF REVIEW FOR THE CHALLENGED PROVISIONS.

Respondents challenge Missouri's statutory post-abortion pathology report requirement, its post-first trimester abortion hospitalization requirement, and its requirement that a second physician be present for post-viability abortions. Review begins with the threshold question of whether the regulations at issue impinge upon any fundamental right. *Maher* v. *Roe*, 432 U.S. 464, 470 (1977). If they do, strict scrutiny is appropriate. *Id.* If not, the regulations face "the less demanding test of rationality." *Id.* at 478.

A. Strict Scrutiny Is Only Appropriate When Legislation Substantially Burdens the Woman's Freedom to Decide.

Whether abortion regulations impinge upon a woman's right to choose—i.e., whether they trigger strict scrutiny—depends upon whether such regulations "substantially limit access to the means of effectuating that decision." *Carey* v. *Population Services International*, 431 U.S. 678, 688 (1977). Such substantial burdens* on the abortion

* By "substantial burden" is meant a state-imposed restriction on the exercise of a right which is sufficiently burdensome so as to constitute an impingement, thus triggering strict scrutiny. To withstand strict scrutiny, the restriction must be justified by a sufficiently compelling interest. Otherwise, the restriction constitutes an "undue burden" and is unconsitutional. An "insubstantial burden" is a restriction with an impact that is insufficient to trigger strict scrutiny.

right appear only in certain limited contexts, viz., total prohibitions, *see Roe* v. *Wade*, 410 U.S. 113 (1973), regulations "almost tantamount to a prohibition," *see Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 92, 102 (1976) (concurring opinions of Stewart, J., and Stevens, J.), and absolute third-party vetoes, *see, e.g., Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (*Bellotti II*).

Strict scrutiny is not required merely because some individuals will be "discouraged" from exercising a specific choice. *See Whalen* v. *Roe*, 429 U.S. 589, 602-603 (1977). In such a case, there is no absolute or near absolute prohibition. Nor is there a blanket third-party veto. Therefore, it cannot "be said that any individual has been deprived of the right to decide independently." *Id.* at 603.

Similarly, a substantial burden on the abortion decision is not created by a statutory requirement merely because it might increase the cost of an abortion. In *Danforth*, this Court held that recordkeeping and reporting requirements, which certainly add to the cost of an abortion, did not have a "legally significant impact or consequence on the abortion decision," 428 U.S. at 81, and thus did not trigger strict scrutiny. *See also Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (requirement that a licensed physician perform the abortion). These cases make it clear that strict scrutiny should be "invoked only when the state regulation *entirely frustrates or heavily burdens* the exercise of constitutional rights in this area." *Carey* v. *Population Services International*, 431 U.S. 678, 705 (1977) (Powell, J., concurring in part and concurring in the judgment) (emphasis added).

B. Strict Scrutiny May Not Be Invoked Merely Because Abortion Is Treated Differently Than Other Medical Procedures.

The mere differential treatment of abortion from other medical procedures does not trigger strict scrutiny. Equal protection analysis applies strict scrutiny to the disparate treatment of a suspect class of *individuals* based on their *status*. But abortion implicates no suspect class. *See Maher* v. *Roe*, 432 U.S. at 470. Moreover, differential treatment of *procedures* cannot be equated with differential treatment of *individuals*. Hence, strict scrutiny cannot be invoked under equal protection principles when abortion is treated differently than other medical procedures.

Even so, in the context of its analysis of the post-abortion pathological report requirement, the court of appeals apparently invoked strict scrutiny merely because abortion had been singled out and treated differently than other medical procedures:

> "*Where the state regulates abortions beyond its regulation of similar surgical procedures, that difference in treatment must be shown to be necessitated by the particular characteristics of the abortion procedure.* *See Word* v. *Poelker*, [495 F.2d 1349, (8th Cir. 1974)]." *Hodgson* v. *Lawson*, 542 F.2d 1350, 1357-58 (8th Cir. 1976) (emphasis added, footnote omitted).
>
> . . .
>
> [T]he question here is whether Missouri has shown any reason why the physicians and medical facilities performing abortions cannot make medical judgments about the desirability of a pathology report in an individual case, while physicians and medical facilities performing all other types of surgery are free to exercise their professional judgment.

Planned Parenthood Association of Kansas City, Missouri v. *Ashcroft*, 655 F.2d 848, 870 (8th Cir. 1981).

This Court has repeatedly rejected such an analysis. In *Planned Parenthood of Central Missouri* v. *Danforth*, the plaintiffs argued "that the State should not be able to impose any recordkeeping requirements that significantly differ from those imposed with respect to other, and comparable, medical or surgical procedures." 428 U.S. 52, 80-81 (1976). This Court rejected that argument and sustained the requirements. *Id.* The Court reaffirmed this holding in the context of consent provisions, *Bellotti* v. *Baird*, 428 U.S. 132, 148-150 (1976), and Medicaid funding, *Maher* v. *Roe*, 432 U.S. 464, 473 (1977). More recently, this Court has stressed that "the unique nature and consequences of the abortion decision" fully justifies special treatment. *Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (*Bellotti II*). In a still more recent case, this Court dispensed of the equal protection analysis suggested by the court of appeals in the instant case:

> The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective." *McGowan* v. *Maryland*, 366 U.S. [420, 425 (1961)].

Harris v. *McRae*, 448 U.S. 297, 422 (1980) (footnote omitted).

Thus, unless the Missouri regulations at issue here substantially burden the right to choose abortion, they cannot be subjected to strict scrutiny, regardless of whether they treat abortion differently than other medical procedures.

All that the state need demonstrate is that these abortion regulations are not "wholly irrelevant" to the achievement of some valid state interest in order to sustain them against an equal protection attack. Abortion regulations cannot be stricken merely because similar regulations have not been enacted with regard to other medical procedures. As this Court has held, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 [(1911)]. It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 486-487 (1970).

C. The Regulations at Issue Do Not Substantially Burden the Woman's Freedom to Decide; They Rationally Relate to Legitimate State Interests.

1. Requirement of Second Physician.

The court of appeals applied the strict scrutiny test to Missouri's requirement that a second physician attend all post-viability abortions. Noting that this requirement would increase the expense of an abortion, the court of appeals held that "a government-imposed regulation that adds to the cost of abortion is a government-created obstacle and is subject to strict scrutiny." *Planned Parenthood* v. *Ashcroft*, 655 F.2d 848, 864 (8th Cir. 1981).

This broad holding not only conflicts with *Danforth* and *Menillo*, but also with the court of appeals' own holding that strict scrutiny is inappropriate in considering record-keeping requirements even though they raise the price of an abortion. *Id.* at 871. The second physician requirement does not prohibit abortions, as did the regulation before this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973). Nor does

the provision provide for a blanket veto, as in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (*Bellotti II*). Thus a proper analysis of the second physician requirement would address the question of whether the increase in cost is so great as to be "drastically limiting [of] the availability and safety of the desired service." *Maher* v. *Roe*, 432 U.S. 464, 472 (1977).

Post-viability abortions, with their high attendant risks, will almost certainly be performed in a hospital. Given the easy availability of pediatricians in a hospital setting, it is unlikely that the requirement that a second physician attend the abortion procedure will so increase the relative cost of the abortion as to preclude women from choosing to have an abortion. Hence, the regulation does not significantly limit a woman's access to abortion, and cannot be said to place a substantial burden on the woman's right to choose.

Indeed, the second doctor requirement cannot properly be said to implicate the right to abortion at all. It is intended to provide assistance to infants born alive *after* termination of pregnancy, and thus relates to abortion in, at most, a very indirect fashion. The second physician requirement is an *infant care regulation*, not an abortion regulation.

Surely, this Court would not hold that a state requirement that a physician (as opposed to a mid-wife) must attend childbirth in order to assure proper medical attention to newborns "burdens" the right to childbearing. It would not hold that a state requirement that every newborn child must be examined by a physician or that certain drugs or vaccinations must be provided to the child "burdens" the right to childbearing. Neither should it hold

that a state requirement that a second physician be available during a post-viability abortion to assist a surviving child "burdens" the right to choose abortion.

"The remaining question then is whether the [second physician provision] is rationally related to a legitimate governmental objective." *Harris* v. *McRae,* 448 U.S. 297, 324 (1980). Certainly, the state maintains a most compelling interest in the life and health of any infant person born alive as the result of an attempted abortion. The presence of a second physician with the specific duty to care for a child surviving a post-viability abortion significantly furthers this interest since it may be presumed that the physician who attempts to kill the fetus before birth would not actively seek to assist a surviving infant.*

2. Pathology Reports.

The court of appeals held that the requirement of pathology reports for all abortions, like the second physician requirement, increased the cost of an abortion. 655 F.2d at 869. As already noted, strict scrutiny does not apply simply because a regulation raises the cost of an abortion. *See Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976); *Connecticut* v. *Menillo,* 423 U.S. 9 (1975). In *Danforth,* this Court disclaimed the need for strict scrutiny and upheld cost-increasing recordkeeping requirements because they, like the pathology reports at issue here, "can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." *Id.* at 81 (footnote omitted).

---

* The record clearly indicates the need for a second physician to provide proper care for a child aborted alive. *See* testimony of Dr. Crist. Tr. 431, 435 (woman has a right to a dead fetus; never attempts to save fetus).

Since a minor cost increase is the only effect of this provision on the woman's decision, strict scrutiny should not be applied.

When examined under the rational basis test, the pathology report requirement is clearly constitutional. The state has an "important and legitimate interest in the health of the mother." *Roe* v. *Wade*, 410 U.S. 113, 163 (1973). "[P]athology reports are useful and even necessary in some cases," and "may warn of serious, possibly fatal disorders." *Planned Parenthood* v. *Ashcroft*, 655 F.2d at 870.

As illustrated in the Appendix, pathology reports are crucial in the detection of life-threatening conditions. Without regular pathology reporting, the incidence of maternal deaths from abortion will increase. Complications that pathology reports can detect include uterine perforation, rupture of maternal organs, incomplete abortions, infection and excessive bleeding. Each can lead to maternal death. The report can also warn of such urgent and potentially lethal conditions as ectopic pregnancy, hydatidaform mole (degenerate pregnancy), and choriocarcinoma (a highly malignant cancer). *See* Appendix.

Maternal mortality is a concern central to the right recognized in *Roe*, 410 U.S. at 163 (strength of state interest proportional to mortality rate for abortion and childbirth). Pathology reports, which directly and efficiently reduce the number of abortion deaths, serve the legitimate and compelling state interest in maternal life and health.

3. Hospitalization Requirement.

Similar considerations support the constitutionality of the post-first trimester hospitalization requirement. Like the pathology report requirement, this provision aims to enhance maternal health and reduce maternal deaths. It

does not prohibit abortions. It does not provide for an absolute third-party veto, nor does it so increase the cost of an abortion that it would drastically limit access to abortion. Therefore, it cannot be said to substantially burden the woman's decision to have an abortion. Hence, the hospitalization requirement is not subject to strict scrutiny.*

Under the rational basis test, the hospitalization requirement is clearly constitutional. The state has a legitimate—indeed compelling—interest in maternal health after the first trimester. *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). Hospitals, with their superior treatment facilities —including intensive care units, blood banks, and various other equipment (all available 24 hours a day), as well as sizable staffs, including a wide variety of experts and specialists—provide an environment which is especially conducive to the protection of maternal health. Therefore, the post-first trimester hospitalization requirement is rationally related to the legitimate and compelling state interest in maternal health and is constitutional.

II.

EVEN UNDER STRICT SCRUTINY ANALYSIS, THE PROVISIONS ARE CONSTITUTIONAL.

Even were this Court to apply strict scrutiny and require a "compelling state interest," these provisions should be upheld. In its general form, the "compelling

---

* *Roe* indicated that a hospitalization requirements might be acceptable after the first trimester. 410 U.S. at 163. This implies that such a requirement could reasonably relate to the state's compelling interest in maternal health. This does not necessarily imply that a hospitalization requirement must always be subjected to strict scrutiny.

interest" standard states that the "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *See Roe* v. *Wade*, 410 U.S. 113, 155 (1973), and cases there cited.

The specific context of abortion rights produces a specific interpretation of the "narrowly drawn" requirement. With respect to the state's interest in potential human life, the statute is "narrowly drawn" even if the state goes so far as to proscribe all abortions except those performed to preserve the life or health of the mother. *Id.* at 163-164. With respect to the state's interest in maternal health, a regulation is narrowly drawn if it "*reasonably relates* to the preservation and protection of maternal health." *Id.* at 163 (emphasis added).

A. The State's Compelling Interest in the Life of Infant Persons Justifies the Second Physician Requirement.

1. The State Has a Compelling Interest in Actual Human Life.

The state possesses a "legitimate interest in protecting the potentiality of human life." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). Throughout pregnancy, abortion "is inherently different" from other medical procedures "because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980). After viability the state's interest becomes "compelling," and, because of the unique importance of this interest, the state "may go so far as to proscribe abortion . . . except when necessary to preserve the life or health of the mother." *Roe* v. *Wade*, 410 U.S. at 163-164.

But when an infant is born or aborted alive, the state's interest becomes complete. At birth, the child becomes a

citizen and a full person under the Constitution. The child receives the full protection of the civil and criminal laws of the states.

The child protected by the second physician requirement possesses *actual*, not just potential human life. The rights under the Constitution of infants who survive abortion are equal to those of their mothers. Certainly, any "right to abortion" in this context cannot be deemed superior to the right of children to continued life. It is even more certain that whatever indirect effect a state law to protect the life of such infants might have on an abortion practice is outweighed by the ultimate state interest in protecting the lives of its citizens.

2. The Second Physician Requirement Is Narrowly Drawn.

Even if this Court finds that the second physician requirement substantially burdens the right to abortion, this regulation withstands strict scrutiny. A requirement that a second physician attend the abortion procedure is a far less significant burden on the abortion right than the total prohibition of post-viability abortions (except to preserve life or health) permitted by this Court. Moreover, the health of the women is not impaired in the slightest, and may even be enhanced by the presence of a second doctor. If an emergency situation should arise, this second physician will be available to provide instant assistance in treating the woman. The presence of the second physician also frees the first physician to concentrate all his efforts on the woman—efforts that might otherwise be divided were a live birth to ensue. Finally, were the women to enter a near-hopeless condition, the first doctor need not face the agonizing dilemma of choosing between devoting his

energies to preserving the mother's life, despite a poor prognosis, and working to save the child so that at least one of the two would survive.

The court of appeals held this provision to an unnecessarily high standard of precision by holding that it is overbroad for failing to account for circumstances where it is improbable that any child will survive an abortion. 655 F.2d at 865. *Roe* clearly indicates that in the context of post-viability abortions, the "narrowly drawn" requirement is satisfied if a "life or health" exception to an otherwise absolute prohibition is included. 410 U.S. at 163-164. Under the proper standard of review, which respects the vital state interest in the actual life of infant persons, the second doctor requirement is clearly constitutional.

3. The Requirement of a Second Physician Is Not Overbroad: An Abandoned D & E Procedure Might Produce a Live Birth.

Even under a stricter version of the "narrowly drawn" requirement, the second physician requirement is constitutional. The Eighth Circuit held the second physician provision to be impermissibly overbroad. 655 F.2d at 865. The court reasoned that since some doctors would employ the dilatation and evacuation (D & E) technique after the point of viability, and since a D & E is "always" fatal to a viable unborn child, the state had "no possible justification for a second physician during a D & E procedure." *Id.* at 865.

This reasoning is faulty because it is based on the unarticulated, false assumption that a D & E procedure, when attempted, *always* continues at least to the point of fetal destruction. Uncontradicted expert testimony indicated that "when a D & E *is performed* on a viable fetus there is

no chance of survival." *Id.* at 865 (emphasis added). Challengers of the statute did not assert, however, because they could not assert truthfully, that whenever a D & E is attempted, it is completed without complications that might require abandonment of the D & E procedure *before* the death of the fetus. Such complications allow for the possibility of infant survival and justify the attendance of a second physician.

This situation would arise, for example, when cervical dilatation (a procedure preliminary to extraction of the child from the womb) results in laceration of the ascending branch of either uterine artery. Lowensohn & Hibbard, *Laceration of the ascending branch of the uterine artery: A complication of therapeutic abortion,* 118 Am. J. Obstet. Gynecol. 36 (1974). This is a major complication often necessitating hysterectomy (removal of the uterus). A study of this complication noted that laceration and subsequent bleeding can preclude the anticipated abortion procedure and lead instead to a hysterectomy. *Id.* at 37-38. Were such a complication to arise in a post-viability D & E, the result would be effectively a Caesarian section delivery of a live child. The authors noted that such a "catastrophic injury is always possible, even in the hands of skilled and experienced surgeons." *Id.* at 36. Another study, noting the laceration complication, reported an incidence of cervical injury "ranging as high as 7.1/100 abortions." Cates, Jr., Schulz, Gold & Tyler, Jr., *Complications of Surgical Evacuation Procedures for Abortions After 12 Weeks' Gestation,* in Pregnancy Termination 206, 211 (1979). Thus, the possibility of such a situation arising is very real.

Other instances in which a D & E procedure might be abandoned before destruction of the child include those cases in which the mother dies or enters a life-threatening

condition subsequent to initiation of the procedure. Disseminated intravascular coagulation (DIC) "is one of the most serious of the acquired coagulation disorders," Merck Manual 319 (13th ed. 1977), and is a "rare, though serious, complication associated with D & E." Cates, Jr., Schulz, Gold & Tyler, Jr., *supra*, at 211. Moreover, a greater likelihood of DIC syndrome may be associated with both increased gestational age and the particular abortion method, such as D & E. *Id.* at 213. Hence, post-viability D & E should have a significantly higher incidence of this complication. Onset of DIC requires immediate treatment of the mother and, hence, cessation of the D & E procedure. Since the syndrome may result from the introduction of amniotic fluid into the woman's bloodstream via a uterine perforation, hysterectomy (and live birth) may follow. If the woman dies, an emergency Caesarian section offers a chance for infant survival. Similarly, if the woman dies from hypovolemic shock (severe loss of blood), toxic reaction to anesthesia, or other lethal complication following initiation of the D & E procedure, the D & E will be abandoned, again allowing the possibility of infant survival. Since the "risk of death from D & E increases as the gestational age increases," *id.* at 215, these occurrences would be especially likely during a post-viability D & E.

In light of these very real medical possibilities in which an attempted D & E could lead to a live birth, it becomes clear that the Missouri statute is not overbroad. The possibility of an *abandoned* D & E procedure and consequent live birth provides sufficient justification for the requirement of a second doctor, just as the possibility of live birth provides ample justification for the second physician requirement for other post-viability abortions. Since the state cannot know in advance which post-viability abor-

tions will produce a live birth, a requirement that a second physician attend every such abortion is narrowly drawn to suit the compelling state interest in the lives of infants who survive abortion.

B. The State's Compelling Interest in Maternal Health Justifies the Pathology Report and Hospitalization Requirements.

The state also has "an important and legitimate interest in preserving and protecting the health of the pregnant woman," *Roe* v. *Wade*, 410 U.S. at 162. This interest arguably "lies at the core of the personal constitutional freedom recognized in *Wade*." *Harris* v. *McRae*, 448 U.S. 297, 315 (1980). *See also Connecticut* v. *Menillo*, 423 U.S. 9 (1975). The state's interest in maternal health becomes compelling at the end of the first trimester of pregnancy, *Roe* v. *Wade*, 410 U.S. at 163, and even justifies health regulations in the first trimester, *Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (requirement of licensed physician); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 79-81 (1976) (recordkeeping requirements). Given the centrality of the maternal health concern, it follows that the state "may regulate the abortion procedure to the extent that the regulation *reasonably relates* to the preservation and protection of maternal health." *Roe* v. *Wade*, 410 U.S. at 163 (emphasis added).

This principle, which the Court employed to justify post-first trimester hospitalization requirements in *Roe*, applies equally to the pathological reporting requirement at issue here. That it applies in the first trimester of pregnancy is irrelevant. The state ordinarily has a compelling interest in maternal health after the first trimester. *Roe* v. *Wade*, 410 U.S. at 163. This state interest becomes compelling even during the first trimester if the regulation helps to maximize maternal health:

> *Roe* [v. *Wade*, 410 U.S. 113 (1973)] teaches that a State cannot restrict a decision by a woman, with the advice of her physician, to terminate her pregnancy during the first trimester because neither its interest in maternal health nor its interest in the potential life of the fetus is sufficiently great at that stage. But the insufficiency of the State's interest in maternal health is predicated upon the first trimester abortion being as safe for the women as normal childbirth at term, and that predicate holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman. *See* 410 U.S. at 149-150, 163.

Connecticut v. *Menillo*, 423 U.S. at 10-11.

Thus, any regulation which provides for basic "conditions insuring maximum safety for the woman" finds support in a compelling state interest, and this analysis proceeds in identical fashion, whether the regulation applies only after the first trimester or throughout pregnancy.* In both instances, the regulation will be upheld if it contributes to maternal safety and overturned if it "comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting" the abortion right—i.e., if the legislation is not "narrowly drawn." *Planned Parenthood* v. *Danforth*, 428 U.S. at 79; *see also Doe* v. *Bolton*, 410 U.S. 179, 194 (1973).

1. Pathology Reports.

Were this Court to strictly scrutinize the pathology report requirement, the statute would find sufficient justification in the state's interest in maternal health. Regular pathology reports constitute "conditions insuring maxi-

---

* Of course, not every health regulation falls into this category. Only those regulations that would provide for essential care which serve to decrease the *mortality* rate of abortion procedures find justification in a compelling state interest in all three trimesters.

mum safety for the woman", as illustrated in the Appendix. Pathology reports can identify, for example, such serious and possibly fatal complications as uterine perforation (puncture of the womb), and can warn of otherwise undiagnosed and subsequently lethal conditions such as ectopic (tubal) pregnancy. *See* Appendix. Thus, this safety measure forms a part of the predicate without which the state's interest is no longer insufficient. *Connecticut* v. *Menillo*, 423 U.S. at 10-11.

In *Roe* v. *Wade*, this Court held that a woman might be hospitalized after the first trimester of pregnancy because of the excess maternal mortality arising from abortion after that time. 410 U.S. at 163. Similarly, the state might properly require pathology reporting because of the excess maternal mortality that would occur absent such reports.

Moreover, a pathology reporting requirement is especially desirable for abortions, simply because of the special problems that accompany this procedure. Abortion has been a medical procedure associated with an unusually high incidence of abusive practices. *See, e.g., The Abortion Profiteers*, Chicago Sun-Times, 1978 (special reprint). The Sun-Times series revealed widespread shoddy practices, including failure to obtain proper pathology reports. One clinic neglected to preserve tissue samples for analysis. *Id.* at 25, col. 4. Other clinics sought pathology reports, but handled the specimens "so carelesly that the reports it gets back may be meaningless." *Id.* at 26, col. 2. In an article exposing 12 maternal deaths following Chicago clinic abortions between 1973 and 1978, the Sun-Times consulted abortion experts:

> "A microscopic exam is essential," said Dr. Paul Szanto, Chicago's dean of pathology and director of Cook County Hospital's pathology division. "Even

with a microscope, it happens over and over again that we cannot see [the true signs of pregnancy]."

Dr. Willard Cates Jr., who oversees abortion surveillance for the National Center for Disease Control in Atlanta, believes pathological reports are so important that no clinic should allow a patient to leave the premises without one.

"You can't let a woman walk out of an abortion clinic without an immediate review of the specimen," Cates said.

Without that lab analysis, he said, "You can't be certain that the woman was pregnant, or that you got all the fetal remains, or whether she had an ectopic pregnancy."

Id. at 26, col. 3.

This Court has referred to improper abortion practices on several occasions. *See, e.g., Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring); *Bellotti* v. *Baird*, 443 U.S. 622, 641 n.21 (1979) (*Bellotti II*) (minors may resort to "incompetent or unethical" abortion clinics). These problems reinforce the need for legislative control over clinic practices, and supplement the medical grounds for pathology reports (*see* Appendix) already acknowledged by the court of appeals. 655 F.2d at 670. Clearly, this health measure directly furthers and is reasonably related to the state's compelling interest in the pregnant woman's life and health, and it thus survives strict scrutiny.

2. Hospitalization Requirement

Roe specified that a hospitalization requirement would be a permissible state regulation of post-first trimester abortions. 410 U.S. at 163. The court of appeals nonetheless overturned this requirement merely because one of the several procedures used for second and third

trimester abortions, dilatation and evacuation (D & E), was not found to be widely available within hospitals and was not found to be "safer" when performed in a hospital than when performed outside a hospital. 664 F.2d at 687, 689. But this holding is tantamount to requiring that a statute must be "perfectly drawn" in order to "reasonably relate" to maternal health. Such a standard would permit no regulation of abortions at all, except on a case-by-case basis. Even a physician requirement would be unreasonable, since, for example, fourth-year medical students at a high caliber urban medical school might well be more competent to perform abortions than rural podiatrists would be.

Moreover, since the state cannot know in advance when complications will arise which require a hospital environment, the state can only weigh the competing interests of safety and convenience. If the resultant legislation so balances these interests as to be reasonably related to maternal health, then the legislation withstands strict scrutiny.

The Constitution does not require that abortion health regulations correspond perfectly to state interests in every instance. Rather, the legislative enactment must be evaluated as a whole, to see if it will "serve" or "enhance" the state interest offered as a justification. *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 75 (1976). Regulations that serve the state's interest in maternal health need only be "reasonably related" to that interest to survive constitutional attack. *Roe* v. *Wade,* 410 U.S. at 163. Hence, the lower court in this case should have compared *generally* the safety of hospitalized abortion after the first trimester with non-hospitalized second and third trimester abortion, rather than singling out D & E abortion for special treatment. Such a comparison, if

carefully conducted to control for biases,* would have provided a proper basis for determining whether the post-first trimester hospitalization requirement is reasonably related to maternal health.

The Court of Appeals for the Eighth Circuit also based its holding that the post-first trimester hospitalization requirement was unconstitutional on a finding by the district court that "second trimester D & E procedures performed at out-patient facilities are just as safe as those procedures performed in hospitals." No. 79-4142-CV-C-H, slip op. at 14 (W.D. Mo. Oct. 2, 1981). From this factual determination the court of appeals concluded that "section 188.025 is not reasonably related to maternal health and, therefore, . . . is unconstitutional." 664 F.2d at 690.

The court's conclusion, however, rests upon an incomplete understanding of the hospitalization requirement. This requirement seeks not only to reduce the risks of second trimester abortions, but also to facilitate the treatment of complications *when they arise.* Even if the *risks* of complications occurring during a second trimester D & E are identical for procedures performed within hospital or non-hospital facilities, the statutory requirement is nonetheless reasonably related to maternal health because hospitals possess superior facilities for *treatment* when complications do arise.

According to the Centers for Disease Control, Annual Summary 1978 (1980), roughly 50% of all abortions per-

---

* For example, if a woman has a late term abortion, and hence one entailing higher risks, or if a woman has medical indications for attendant complications, she will more likely have her abortion in a hospital. Thus the unanalyzed data will tend to make hospitalized abortions appear to be more dangerous than non-hospitalized abortions. In fact, it is because hospitals are safer that the woman expecting difficulties will enter hospital facilities in the first place.

formed at 13 or more weeks of gestation employ methods other than D & E. *Id.* at 43, Table 14. Of these, hysterotomy and hysterectomy procedures, being major surgery, will necessarily take place in hospitals. Intraamniotic abortifacient instillation procedures constitute the remainder of the post-first trimester abortions. With regard to these one expert, Charles A. Ballard, M.D., commented as follows: "I feel it is necessary that all amnio-infusions be performed in a hospital with a staff present at all times and with an adequate laboratory facility available (e.g., a blood bank)." *Second Trimester Abortion: A Symposium by Correspondence,* 16 J. Reprod. Med. 47, 55-56 (1976). Dr. Ballard went so far as to urge that at least for saline abortion, "these procedures should be performed by competent physicians, under a strict antiseptic regimen, *only in certain designated hospitals* with staff available 24 hours and adequate laboratory facilities." *Id.* at 56 (emphasis added).

Dr. Ballard based his opinion on the existence of "the potential complications of infection, hemorrhage, consumptive coagulopathy, etc." *Id.* at 56. His study did not discuss the D & E procedure, but another report noted that the "most common complications associated with D & E are infection and hemorrhage," Cates, Jr., Schulz, Gold & Tyler, Jr., *Complications of Surgical Evacuation Procedures for Abortions After 12 Weeks' Gestation,* in Pregnancy Termination 206, 210 (1979), and that consumptive coalgulopathy is "a rare, though serious, complication associated with D & E." *Id.* at 211. Since the same complications which make hospitalization imperative for other post-first trimester procedures occur with D & E procedures, it follows that hospitalization is appropriate for D & E abortions as well.

Dr. Willard Cates reports that the misestimation of gestational age contributes to the complication rate for D & E, and that routine sonography might "aid in reducing complications and deaths from D & E." *Id.* at 215. In another study Cates explains that "if routine sonography is to be performed on every woman, an ultrasound scanner" is necessary; therefore, one should keep in mind that "many hospitals already have this equipment available for managing other obstetric and nonobstretric conditions." Cates, Jr., Schulz & Grimes, *Dilatation and Evacuation for Induced Abortion in Developing Countries: Advantages and Disadvantages,* 11 Stud. Fam. Plan. 128, 130 (1980). Dr. Cates continues:

> Because D & E is riskier than curettage at earlier gestations, it should be performed in settings with proper supervision and backup facilities. However, the currently available alternatives—instillation procedures and abdominal hysterotomy—should also be performed under similar circumstances.

Id. at 130.

Clearly a legislature might reasonably conclude that a hospitalization requirement for all abortion after the first trimester is a proper safety regulation. "Since all methods of terminating pregnancies after 12 weeks should be performed under equivalent circumstances," as Dr. Cates indicates, *id.* at 132, it is reasonable if not imperative that the state impose a hospitalization requirement.

The hospitalization requirement is certainly a regulation reasonably related to the state's compelling interest in maternal health. As such, it is narrowly drawn and should be upheld.

III. CONCLUSION

The Missouri regulations at issue before this Court do not substantially burden a woman's right to decide to terminate her pregnancy. Moreover, these provisions are justified by compelling state interests in the heaith of the mother and the actual life of infant citizens.

Wherefore, your amicus prays this Court to reverse the Court of Appeals for the Eighth Circuit, and uphold these provisions.

Respectfully submitted,

DENNIS J. HORAN
VICTOR G. ROSENBLUM
PATRICK A. TRUEMAN
THOMAS J. MARZEN
MAURA K. QUINLAN
230 N. Michigan, Suite 915
Chicago, IL 60601
312/263-5029
Attorneys for
Americans United for Life

Law Students Who Assisted in the Preparation of this Brief: Daniel Avila, Thomas J. Balch, Elizabeth Bower, Michael R. Carey, Richard Cohen, Walter M. Weber.

Medical Consultant for this Brief: Steven R. Zielinski, M.D.

APPENDIX

APPENDIX

Pathology Reports

Induced abortion is not without risks of serious, even life-threatening complications. Pathological examinations can reduce these risks. The purpose of this Appendix is to describe certain abortion-related complications and to note how pathological examinations can maximize the woman's safety by detecting these complications before serious injury or death occurs.

Abortion related complications can be grouped into three broad categories: immediate complications that develop during or within three hours of the abortion, delayed complications that develop thereafter and up to 28 days, and late complications occurring after 28 days. Grimes & Cates, Jr., *abortion: methods and complications*, in Humman Reproduction 796, 800 (1980).

1. Immediate complications.

a. Uterine perforation. Perforation is a common complication in dilatation and curettage (D & C) and dilatation and evacuation (D & E) abortions. McDonald & Aaro, *Medical Complications of Induced Abortion*, 67 S. Med. J. 560, 561 (1974). Perforation can occur during the forcible dilatation (widening) of the cervix or during the curettage (scraping) and removal of the uterine contents. A dilator or curette may pierce the cervical or uterine lining and enter the bowels or the bladder, in the latter case causing extensive urologic complications. Watson, *Urologic Complications of Legal Abortion*, in New Perspectives on Human Abortion 135 (1981). In one case, for example, the physician not only removed the uterine contents, but also took over 17 centimeters of the woman's ureter. The

physician recalled removing an elongated tube, but assumed it was part of the umbilical cord. Gangai, *An Unusual Surgical Injury to the Ureter*, 109 J. Urology 32 (1973). A pathological exam would have identified the elongated tube as part of the woman's ureter and enabled the physician to prevent the extensive bleeding that eventually occurred.

Perforation can occur in suction abortions as well. In suction abortions, the cervix is dilated, an aspirator inserted into the womb, and a powerful vacuum is created. As a result, the uterine contents are sheared from the uterine walls and sucked through the aspirator. Sometimes the vacuum may be placed too close to the wall of the bladder, which is then punctured by the abrupt suction force. In one reported suction abortion, the physician recalled seeing during suction a sudden gush of clear, yellow fluid which he assumed to be amniotic fluid but which was actually maternal urine. The patient was taken to the recovery room after the abortion in satisfactory condition, but soon thereafter was found in shock. Rous, Major & Bordon, *Rupture of the bladder secondary to uterine vacuum curettage: A case report and review of the literature*, 106 J. Urology 685 (1971). A pathologist would have detected maternal bladder lining tissue in the aspirated material, thereby allowing immediate treatment of the woman's injury.

b. Cervicovaginal fistula. This complication can occur in abortions done by amnio-instillation. Instillation abortions are performed by first removing amniotic fluid and then injecting saline, glucose or prostaglandin solutions into the amniotic sac. Each of these substances induces contractions and eventual fetal expulsion. Cervicovaginal fistula formation occurs when the cervix fails to dilate sufficiently during the contractions. Because the fetus cannot

exit through the narrow opening between the uterus and cervix, he or she is pushed through the cervical wall, thereby creating a false passage (fistula) into the vagina. Gordon, *Cervicovaginal fistula as a result of saline abortion,* 112 Am. J. Obstet. Gynecol. 578 (1972). An unrecognized cervicovaginal fistula jeopardizes the successful outcome of future pregnancies since it encourages spontaneous abortion and premature labor. *Id.* at 579. Cervicovaginal fistula formation can also be fatal. Grimes & Cates, Jr., *Fatal uterine rupture during oxytocin-augmented saline abortion,* 130 Am. J. Obstet. Gynecol. 591 (1978). Detection of cervicovaginal tissue among the products of conception examined for a pathological report would alert a physician to the possible existence of fistulas.

A fistula might also result during abortion procedures other than amnio-instillations. In this case the fistula would result from puncture of the cervix during dilatation. This complication may occur in any trimester, and would be detected by a pathologist upon the discovery of cervical tissue.

2. Delayed Complications.

a. Retained products of conception. This complication is one of the most important causes of abortion morbidity. Grimes & Cates, Jr., *abortion: methods and complications,* in Human Reproduction 796, 806 (1980). This complication occurs most often in D & C and amnio-infusion abortions. *Id.* at 806; Burnhill, *Reducing the Morbidity of Vacuum Aspiration Abortion,* in Pregnancy Termination 146 (1979). If left unremoved, fetal and placental tissue will cause infection and hemorrhage. Walton, *Immediate Morbidity on Large Abortion Service,* 72 N.Y. St. J. Med. 919, 920 (1972); Peterson, *Dilatation and Evacuation:*

Patient Evaluation and Surgival Techniques, in Pregnancy Termination 188 (1979). Submission of tissue extracted by an abortion to a pathologist permits verification of the presence or non-presence of all products of conception.

b. Infection and hemorrhage. These complications can result not only from retained products of conception but also from uterine perforation and from the simple introduction of germs into the womb by the instruments of abortion. A pathological examination would reveal the existence of infection in uterine tissue as well as the presence of excessive amounts of maternal blood.

3. Late complications.

a. Missed ectopic pregnancy. An abortion fails to remove the growing embryo if that embryo is lodged in the woman's Fallopian tube. The woman goes home, thinking she has had an abortion, only to die days or weeks later from a tubal rupture or other complication of ectopic pregnancy. Incidences of ectopic pregnancy have risen since 1970. National Center for Health Statistics, Hospital Discharge Survey Data, 1970-1976 (1972-1978). As a result, the number of deaths resulting from missed ectopic pregnancies is also increasing. Rubin, Cates, Jr., Gold, Rochat & Tyler, Jr., *Fatal Ectopic Pregnancy After Attempted Legal Induced Abortion,* 244 J.A.M.A. 1705 (1980). After citing ten cases in which women died as a result of this complication, the authors of the above article recommended as preventive measures both immediate examination of the tissue by the physician doing the abortion and a report by a pathologist. *Id.* at 1708.

b. Trophoblastic disease. Roughly one in 1500 pregnancies in the U.S. degenerates into an abnormality known as a hydatidaform mole (molar pregnancy). R. Benson, Handbook of Obstetrics and Gynecoloy 278 (7th ed. 1980).

Complications of a mole include infection, hemorrhage, and toxemia (blood poisoning). Merck Manual 921 (13th ed. 1977). The mole may also develop into more serious abnormalities. Chorioadenoma destruens, for example, invades the uterine tissue and "may cause uterine perforation, hemorrhage, and sepsis." *Id.* Choriocarcinoma, a highly malignant and extremely dangerous condition, develops in 2 to 3% of molar pregnancies. *Id.* With proper monitoring and treatment, the prognosis for those conditions is good. If an abortion is performed before the condition is diagnosed, however, proper care will not be taken. A pathology report would remedy this situation by detecting the mole among the products of conception.

Clearly, pathological examinations decrease the maternal risks involved in abortion complications. The report will indicate the absence or incomplete presence of feto-placental tissue, the presence of unintentionally removed maternal tissue, and the existence of injurious or malignant maternal conditions. Knowledge of these unanticipated difficulties is vital to the immediate treatment of potentially serious complications. Thus, the state, by requiring pathological exams after each abortion, significantly furthers its interest in maternal health.

Office-Supreme Court, U.S.
FILED
AUG 2 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

Nos. 81-1623
PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., et al.

vs.

JOHN ASHCROFT, Attorney General of the State of Missouri, et al.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

BRIEF OF WOMEN LAWYERS OF SACRAMENTO, PLACER COUNTY WOMEN LAWYERS, AND AUBURN WOMEN'S CENTER

Nancy Reardan
2018 19th St.
Sacto, CA 95818
(916) 441-0720

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

Nos. 81-1623
PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., et al.

vs.

JOHN ASHCROFT, Attorney General of the State of Missouri, et al.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

BRIEF OF WOMEN LAWYERS OF SACRAMENTO, PLACER COUNTY WOMEN LAWYERS, AND AUBURN WOMEN'S CENTER

TABLE OF CONTENTS

Table of Authorities i

Interest of Amici Curiae and Consent 1

Introduction 2

Argument:

I. The Missouri Statutes Create a Double Standard. 6

II. Because an Unwanted Pregnancy per se Constitutes a Burden on a Woman, Medically Unnecessary Restrictions on Pregnancy Terminations Violate Equal

Protection. 11

III. Missouri Has Failed to Demonstrate That Parental Notification Furthers an Important State Interest Substantially Related to the Gender Classification 21

IV. The Statute Mandating Hospitalization for Pregnancy Terminations Creates Unnecessary Classification Schemes Based on Gender 27

Conclusion 43

TABLE OF AUTHORITIES

CASES

Bellotti v. Baird
428 U.S. 128 (1976) 30

Califano v. Wescott
443 U.S. 76 (1979) 7

Carey v. Population Services
431 U.S. 684 (1977) 31

Craig v. Boren
429 U.S. 190 (1976) 7, 31

Doe v. Bolton
410 U.S. 438 (1978) 27, 29, 30, 31, 36, 41

Eisenstadt v. Baird
405 U.S. 438 (1972) 4

Friendship Medical Center v. Chicago Board of Health 505 F.2d 1141 (7th Cir. 197) cert. den. 420 U.S. 997 (1974) 30, 41

Frontiero v. Richardson
411 U.S. 677 (1973) 6, 7

Griswold v. Connecticut
381 U.S. 479 (1965) 4

H.L. v. Matheson
450 U.S. 398 (1981) 11, 23, 26

Harris v. McRae
448 U.S. 297 (1980) 4, 16

Mahoning Women's Center v. Hunter 37
444 F. Supp. 12 (N.D. Ohio 1977)

Michael M. v. Sonoma County 19
Superior Court 450 U.S. 464 (1981)

Mississippi University for 7, 10
Women v. Hogan 32, 34
50 USLW 5068 (1982)

Orr v. Orr 39
440 U.S. 268 (1979)

Planned Parenthood v. Ashcroft 26
664 F.2d 687 (8th Cir, 1981)

Planned Parenthood v. Danforth 30
428 U.S. 42 (1976)

Reed v. Reed 6
414 U.S. 71 (1971)

Roe v. Wade 4, 35, 41
410 U.S. 113 (1973)

Warth v. Seldin 31
422 U.S. 490 (1975)

Wengler v. Druggist Mutual 7, 32, 39
Insurance Co. 446 U.S. 142 (1980)

Word v. Poelker 40
495 F.2d 1349 (8th Cir. 1974)

STATUTES

Utah Code Ann. §76-7-304

U.S. Constitution, Amendment XIV

OTHER AUTHORITIES

The American Promise: Equal Justice and Economic Opportunity Report, Council on Economic Opportunity (1981) 18

California Department of Consumer Affairs, Pregnant Women and Newborn Infants: A Deepening in Health Care (1982) 14

Dallek, Geraldine, Maternal Health Care in America: Sliding Back Down the Moun Santa Monica - National Health Law Project, 1981 17

Karst, Kenneth "Forward: Equal Citizenship Under the Fourteenth Amendment" 91 Harvard Law Review 1 (1978) 9

Pearce, Diana "The Feminization of Poverty" Urban and Social Change Review (Feb 1978) 18

Regan, Donald "Rewriting Roe v. Wade" 77 Michigan Law Review 1569 (1979) 12, 13

INTEREST OF AMICI CURIAE AND CONSENT

The named county women lawyers associations are membership organizations consisting of women and men who seek elimination of sex discrimination through the legal profession. Members represent clients in California who have suffered gender discrimination in violation of federal protection under the Fourteenth Amendment of the U.S. Constitution.

Amici are concerned that the federal provisions that assure equal protection for all citizens are being unduly restricted by laws which create a double standard by requiring emancipation or parental notification for minor women, and not for minor men, and which impose medically unnecessary burdens on women.

This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Consent to the filing of the brief has been given by attorneys for both parties.

INTRODUCTION

This case asks difficult questions about the extent to which a government may impose burdens, in the guise of "protections," on women because they are women. This brief posits that the asserted justifications for the restrictions at issue are a sham, and that the additional and unusual burdens imposed by Missouri on a woman's right to terminate her pregnancy are unsupportable under our Constitution as previously interpreted by this Court.

The authors of this brief acknowledge to the Court and to the world that women are biologically different from men. We acknowledge that only women can become pregnant. A fortiori, we believe, only the woman can decide to terminate her pregnancy.

This Court has recognized that principle. This Court has characterized the decision to terminate a pregnancy as one that is personal to a woman and her physician. The Court has instructed the nation that privacy in the exercise of that decision is constitutionally required.

This brief questions the extent to which a state may heap unusual medical, financial, familial and social requirements on the exercise of this particular medical decision. Amici ask the Court to

consider whether laws imposing these burdens should be permitted to escape strict scrutiny under the Equal Protection Clause of the United States Constitution for no other reason than that the basic burden - - the pregnancy - - can fall upon women alone.

The Court has repeatedly held that the fundamental right to privacy in matters involving contraception, marriage and the right to procreate shall not be infringed. Harris v. McRae 448 U.S. 297 (1980); Roe v. Wade 410 U.S. 113 (1973); Eisenstadt v. Baird 405 U.S. 438 (1972); Griswold v. Connecticut 381 U.S. 479 (1965).

The instant statute allows the state to infringe on this fundamental right by placing unnecessary burdens only on the procreative choice of females. Women,

but not men, must (1) if they are minors, notify their parents of a pregnancy termination; (2) incur the expense of a second attending physician; (3) incur the expense of hospitalization for second trimester abortions; and (4) incur the expense of unnecessary pathology testing.

Amici address in this brief the most pernicious of these requirements: mandatory parental notification and approval for minor females, and mandatory hospitalization.

Amici respectfully request the Court's recognition of the fact that pregnancy in itself is an unusual physical, personal and financial burden, and that the burden falls hardest on unmarried, poor, minor women. Amici ask the Court to imagine the stress of nine months of unwanted pregnancy, and to be

mindful of the life prospects for an unwanted child. Amici ask the Court to avoid burdening women with a duty imposed on no other person under the law. Amici respectfully urge this Court to strike down laws which individually and collectively impinge upon a woman's right to terminate her pregnancy and which have, until now, avoided scrutiny because the suffering falls only on one sex.

ARGUMENT

I

THE MISSOURI STATUTES CREATE A DOUBLE STANDARD.

A. Sexually Active Men And Women Under Age 18 Are Treated Differently.

Gender-based classifications may not be based on archaic assumptions about the proper role of the sexes. Reed v. Reed 404 U.S. 71 (1971); Frontiero v. Richardson 411 U.S. 677 (1973); Craig v. Boren 429 U.S. 190 (1976); Califano v. Wescott 443 U.S. 76 (1979); Wengler v. Druggist Mutual Insurance Co. 446 U.S. 142 (1980); and Mississippi University for Women v. Hogan ___ U.S. ____, 50 USLW 5068, 5070 (July 1, 1982,).

In Missouri, unemancipated young women who become pregnant are burdened by regulations which require parental notification and approval of a decision to terminate a pregnancy. Even if these young women are emancipated, their parents must still be notified. Young men, though equally responsible and interested in the pregnancy, are subject to no simi-

lar regulation, whether or not they are emancipated.

By omitting young men from the purview of this statute, Missouri implies that young men are sufficiently mature to regulate their procreative activity and therefore not in need of parental guidance or supportive conversation. The parents of sexually active young men under 18 may never know of their sons' responsibility for resultant pregnancies. These provisions allow young men to abrogate their responsibilities and serve only to perpetuate the double standard which permits men to be sexually active but requires that women be chaste or suffer the consequences.

B. The Parental Notification Requirement Stigmatizes and Punishes Minor Women

The psychological burden of an unwanted pregnancy effectively stigmatizes young women.

Kenneth Karst in "Equal Citizenship Under the Fourteenth Amendment" 91 Harvard Law Review 1, 57 (1977) states that women will achieve equal citizenship only when the judiciary rejects the symbolism of dependency. However, Karst points out this will not occur as long as:

> (1) our society's traditional double standard of sexual morality . . . places a greater stigma on unmarried women who become pregnant, than on the men who father their children; (2) our society's continuing expectation is that women take the major responsibility for contraception and childcare. Id., 37.

As long as the state of Missouri continues to place burdens solely on

women, it supports this double standard for men and women and stigmatizes women.

Karst points out that when one person is singled out for treatment which places her in a dependent status, e.g. by requiring a young woman seeking a pregnancy termination to notify her parents, her identity is damaged. Enforced dependency results in second-class status. The young woman becomes a victim who "suppresses aspirations that look unattainable when seen with the restricted vision imposed by a withered self-concept." Id., 7.

As long as women must suffer medically unnecessary, legislatively-imposed restrictions, but men need not, women are stigmatized, and men escape unscathed for the same conduct. Such restrictions "reflect[s] archaic and stereotypic

notions". Mississippi University for Women v. Hogan, supra, 50 U.S.L.W., 5070.

It is established that "the absolute nature of the statutory requirement. . . violates the requirement that regulation in this fundamentally personal area be carefully tailored to serve significant state interests." H.L. v. Matheson, supra, 450 U.S. 446. However, given the social stigma and medical dangers involved in childbirth for minor women, to preclude termination of an unwanted pregnancy because of statutorily imposed parental intervention not only fails to serve such an interest, but also serves only to punish pregnant minors. Men, no matter what age, are not subject to similar parental intervention.

II

BECAUSE AN UNWANTED PREGNANCY PER SE CONSTITUTES A BURDEN ON A WOMAN, MEDICALLY UNNECESSARY RESTRICTIONS ON PREGNANCY TERMINATIONS VIOLATE EQUAL PROTECTION.

A. Pregnancy Itself Constitutes A Burden On Women

1. Physical Burden

Donald H. Regan, in "Rewriting Roe v. Wade" 77 Michigan Law Review 1569 (1979) fills four pages with the ordinary complaints which accompany any pregnancy. From faintness and nausea to the risk of death in childbirth, virtually all women must "...put up with enough pain, discomfort and disruption of appearance and emotional state to add up to a major burden."

Regan further states, "It is worth mentioning that all of the pains and discomforts listed above are likely to be aggravated when the entire pregnancy is unwanted. It is much easier to bear up under pain and inconvenience when they serve some end one has chosen than when they do not...." Id., 1582.

Regan discusses the equal protection aspects of pregnancy termination through the use of a "good samaritan" tort analysis. Id., 1636. No person has a duty to come to the assistance of any other person except in the abortion context, where a woman is required to sacrifice herself for a fetus. The state's interest in potential life can never justify forcing a woman to risk her health for another life. Id., 1640. No woman should be forced by any other person or the state

to bear children. This is symptomatic of a totalitarian society that does not support "constitutional values [such as] non-subordination, freedom from physical invasion, and equal protection." Id., 1639.

2. Lack Of Adequate Medical Care

In addition to the personal physical burden of pregnancy, women experience difficulty in obtaining medical care. In many parts of the country, family planning and prenatal services are virtually nonexistent. In March 1982, the State of California reported that basic obstetric and gynecologic services from high quality fee-for-service physicians and private hospitals are unavailable to all but the most affluent. California Department of

Consumer Affairs, Pregnant Women and Newborn Infants: A Deepening Crisis in Health Care.

The consequences of inadequate access are seen most graphically in comparisons of infant mortality rates. For example, the infant mortality rate in Scandinavian countries is six per one thousand.*

In California, the infant mortality rate is 12.3 per one thousand for white infants. This rate doubles in medically underserved areas: for example, for Black infants in Oakland, the rate is 23.6 per 1,000; for Hispanic infants at L.A. County Medical Center, 25 per 1,000;

---

*This rate correlates with national health insurance programs which provide coverage for all pregnancies and all pregnancy terminations, plus universal access to contraceptives, irrespective of age.

and for infants born in rural El Dorado County, 23 per 1,000. Lower rates of infant mortality correspond to prenatal care during the first trimester. Dallek, Geraldine, "Maternal Health Care in America: Sliding Back Down the Mountain," National Health Law Project, 1981,5.

This lack of adequate care constitutes a burden on pregnancy over which pregnant women have no control. It is another burden in the area of procreative freedom which affects only women.

3. Parenthood And Poverty

Financial barriers compound the demographic/geographic lack of access to medical care.

The Supreme Court in Harris v. McRae 448 U.S. 297 (1980) held that the federal

government may choose to fund childbirth and not pregnancy termination. Since then, governmental financial policies have effectively denied access to health care during pregnancy for significant numbers of women.

Even childbirth in hospitals is precluded for financial reasons. Hospital imposed financial restrictions often include requiring deposits or Medicaid co-payments, and requiring on-staff referring doctors for admission or doctors who will accept Medicaid patients.

Dallek's study, "Maternal Health Care" etc., supra found that financial constraints alone, without additional restrictions, resulted in more than fifty percent of all children in Brownsville, Texas being born outside hospitals. Dallek also documents that nineteen

states do not cover first-time pregnant women under their Medicaid programs.

In many states it is not unusual for all but state- or county-funded hospitals to reject women in labor. These institutions often go bankrupt because indigent care drains the financial resources of the state or local government. In California, between 1970 and 1980, 24 out of 57 county hospitals were closed for this reason.

Thus, the irony of governmental refusal to pay for pregnancy termination compounds the ignominy of its refusal to pay for childbirth and prenatal care in a hospital or clinic.

The National Advisory Committee on Economic Opportunity in "The American Promise: Equal Justice and Economic Opportunity," (1981) concluded that over

fifty percent (217,000) of all poor families are headed by women.

In a seminal article entitled "The Feminization of Poverty: Women, Work and Welfare," Urban and Social Change Review (February, 1978), Diana Pearce outlines the shift of poverty from two-parent households to women-headed households in the 1980's. More than forty-six percent of these women were never married and a majority of them did not see a doctor at all until the second trimester of pregnancy.

This Court noted the link between poverty and teenage pregnancy in Michael M. v. Sonoma 450 U.S. 470 fn.3,and 4, citing the Alan Guttmacher Institute's 11 Million Teenagers, at 10, 13, 23, 25.

Frequently undereducated because they left school as a result of unwanted pregnancies, these women barely subsist on Aid For Dependent Children (AFDC) programs.*

The physical, financial and personal burdens of pregnancy are magnified when the pregnancy is unwanted, or when it befalls a minor, unmarried woman. Even in the absence of any statutory restrictions, an unwed woman seeking a pregnancy termination must overcome severe hurdles. Initially, she must find a doctor who will see her to determine whether she is pregnant. In rural areas of the U.S. and

*These programs range from $26.00 per person per month in Mississippi to $119.00 per person per month in New York. The average for the nation is $5,318.00 for families on welfare compared with the $21,703.00 national median income of two-parent working families.

in medically underserved urban areas, it may be difficult to locate a local doctor. A woman frequently must travel to a distant community that provides obstetric and gynecological care. She is therefore faced with transportation and lodging expenses. If an individual is indigent, the number of doctors taking Medicaid is severely restricted because these rates are below private rates. All of these factors serve only to delay, thereby increasing the duration of the procedure, the cost of medical treatment, the psychological damage, and the chance of maternal death.

III

MISSOURI HAS FAILED TO DEMONSTRATE THAT PARENTAL NOTIFICATION FURTHERS AN IMPORTANT STATE INTEREST SUBSTANTIALLY RELATED TO THE GENDER CLASSIFICATION

Among the interests proffered by the State in justification of the gender classification inherent in the notification requirement are the protection of maternal health and the promotion of family integrity. These interests are spurious.

A. The Parental Notification Requirement Fails To Advance the State's Interest in Promoting Maternal Health.

State policies that discriminate on the basis of gender must show that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. " Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150. The

classification must assist "members of the sex that is disproportionately burdened." Mississippi University for Women v. Hogan, 50 U.S.L.W. 5069.

Parental notification in Missouri is an absolute barrier to pregnancy terminations performed in hospitals, because all hospitals require this notification.

Missouri has failed to make any showing that a substantial state interest in maternal health is furthered by the parental notification requirement. The state implies that mandatory parental notification fosters maternal health indirectly by promoting parental guidance on the topic of pregnancy. The statute at issue, according to the State of Missouri, like the Utah statute in H.L. v. Matheson, supra 450 U.S. 424, "would tend to facilitate communication between daughters and parents."

However, the Court in H.L. failed to mention the parental communication which might prove helpful between the male, who must share the responsibility for the pregnancy, and his parents. This type of statute thus assumes that female minors are unable to make decisions regarding contraception and pregnancy, while male minors are able to so decide. This distinction is unjustified by any showing made by Missouri, especially in light of the generally-accepted premise that females mature earlier than males.

The exception for to the parental approval requirement for emancipated females creates a presumption that all minor women are immature until they have demonstrated maturity whereas minor males are presumed sufficiently mature to make medical decisions. The exception, like

the rule, does little to promote maternal health. In fact, additional burdens inhere in the emancipation exception. A minor woman must have the financial and emotional resources and must be able to afford her own lawyer and proceed expeditiously through the notice/hearing requirements of the law. During the second trimester of gestation, each day of delay pushes the pregnant woman into greater medical danger. The stated purpose of protecting maternal health certainly is not achieved under this exception.

If parental notification requirement does, in fact, support a substantial interest in communication between parents and children concerning pregnancy, then parents of minor males must also logically be notified.

B. Parental Notification Requirements Do Not Serve the State Interest in Protecting Family Integrity.

News reports daily confirm that young women are subject to sexual assault by fathers, step-fathers and adult male relatives and boyfriends (See, e.g., Sacramento Bee, July 14, 1982; See also Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848,859, fn. 13 (1981), where data is cited showing that 50% of children age 12 and younger who seek abortions are incest victims.) Others are victims of child abuse, parental alcoholism and drug abuse, mentally ill parents, and the stresses accompanying divorce. Forced communication between pregnant minor females and par-

ents who endanger these children can hardly be deemed to promote family integrity.

According to Justice Marshall, dissenting in H.L. v. Matheson, supra 450 U.S. 448, the purpose of cases protecting parental authority is to protect the family from state intrusion, not to justify mandatory state intrusions. "Whatever its motive, state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve."

IV

THE STATUTE MANDATING HOSPITALIZATION FOR PREGNANCY TERMINATIONS CREATES UNNECESSARY CLASSIFICATION SCHEMES BASED ON GENDER.

A. Missouri's Statutory Hospitalization Requirements Apply Only To Pregnancy Terminations And Not To All Surgeries With Similar Risks.

Although states protect the health and well-being of their citizens by requiring physicians to be examined and licensed by the State and by requiring hospitals and clinics to meet various building and inspection standards for licensure, states do not generally substitute legislative dictates for a physician's judgment on how best to medically treat a specific patient. See Doe v. Bolton, 410 U.S. 179, 199 (1973). Rather, the emphasis in our society has been precisely opposite, that is, to encourage and respect the physician's judgment and expertise in medical areas. As this Court has previously stated,

> "...medical judgment may be exercised in the light of all factors [such as] physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient.... This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the [patient]." Id., 192.

Yet, Missouri has inserted its legislative judgment in place of the doctor's best medical judgment concerning the health of the patient. No other surgical or medical procedures are so burdened. Thus, a doctor may assess, free from the chill of statutory prohibitions, all relevant factors pertaining to the health of the individual patient when determining whether to perform a vasectomy, a commonly used male sterilization procedure, in a medical office, a clinic or a hospital. If a doctor does not exercise adequate medical judgment and a patient

is injured because a procedure is improperly performed on an out-patient basis, then the doctor will be subject to civil liabilities, Doe v. Bolton, 410 U.S. at 199.

Under the Missouri law, however, if a doctor weighs all the factors relating to the health of his patient and, in the exercise of sound medical judgment, elects to perform a pregnancy termination in an office or a clinic,that election will have violated the legislative proscription. To isolate pregnancy terminations in this way "treats differently, without a compelling reason, medical procedures which in terms of health risk are not distinguishable." Friendship Medical Center v. Chicago Board of Health, 505 F.2d 1141, 1153 (7th Cir.) cert. denied 420 U.S. 997 (1974). Such

differential treatment violates the Equal Protection Clause of the Fourteenth Amendment. See Doe v. Bolton, supra, 410 U.S. 194; Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 77-78 (1976); Bellotti v. Baird, 428 U.S. 128, 149-150 (1976).

The statute challenged here does not directly regulate the conduct of women seeking second trimester abortions. However, this Court has consistently recognized that restricting the operations of providers of goods or services may "result indirectly in the violation of third parties' rights." Warth v. Seldin, 422 U.S. 490, 510 (1975); Carey v. Population Services International, 431 U.S. 684, 694 (1977); Craig v. Boren, 429 U.S. 190, 195 (1976).

In the instant case a female patient seeking an abortion was denied "the right to receive medical care in accordance with her licensed physician's best judgment" and the physician was denied " the right to administer it." Doe v. Bolton, 410 U.S. at 197.

There is no similar context in which male patients, as a class, have been denied the medical care which a physician deems in his/her medical judgment to be best for the particular patient. Such differential treatment establishes a statutory classification that distinguishes between males and females solely on the basis of gender.

B. Sanctions Against Performing Pregnancy Terminations In Non-hospital

Facilities Result In Invidious Discrimination.

This Court has repeatedly held that "gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of these objectives." Wengler v. Druggists Mutual Insurance Co., supra, 446 U.S. 142, 150

The alleged state interest in the hospitalization requirement at issue is maternal health. Missouri has the burden of showing a direct and substantial relationship between the hospital requirement and the objective of protecting maternal health. Mississippi University for Women v. Hogan, ___ U.S. ___, 50 U.S.L.W. 5068, 5070. Missouri has failed to satisfy this burden.

There is no evidence in this case that licensed physicians in Missouri are incapable of making reasoned decisions when selecting medical settings for the performance of minor surgery. Yet the state, to rationalize its statute, must believe that doctors are competent to select proper settings for all types of surgery except pregnancy terminations.

Missouri has failed to establish that licensed physicians are incompetent in caring for these patients. This Court is respectfully requested to find that licensed physicians exercise the same degree of care in determining which patients to hospitalize irrespective of the medical condition of the patient.

The necessary inference derived from the statute, that physicians who perform pregnancy terminations are less competent

than other physicians, is a mechanical application of an inaccurate stereotype about the need of women for special protection. Further, such a legislative judgment has been held improper. Mississippi University of Women v. Hogan, supra ___ U.S. ___, 50 U.S.L.W. 5070. In the era of back-alley and kitchen-table abortions and less sophisticated medical procedures, a legislative body may have had a legitimate basis for regulating the setting for pregnancy terminations. Such is far from the case in the 1980's. All of the medical practitioners performing pregnancy terminations subject to the hospital requirements at issue herein are licensed physicians.

Missouri has failed to establish that non-hospital settings are inherently unsafe. A common pregnancy termination

technique, dilatation and evacuation (D & E) is safely performed in out-patient clinics through the 17th and 18th weeks of pregnancy, well into the second trimester. Since the Roe decision in 1973, specialized clinics for the performance of legal pregnancy terminations have had nearly 10 years to train and develop staff with expertise in these procedures.

In the modern factual setting, licensed physicians must be free to exercise their professional judgment in selecting appropriate settings for all medical procedures without legislative interference. To decide otherwise is to unwisely hold onto the shibboleths of the past. The State's hospitalization requirements merely reinforce the traditional sexual stereotype that women need special protection from their own doc-

tors. These medical myths have led to gender-based classifications and legislative decisions which are unconstitutional as well as unwise. This Court has recognized that in the areas of medicine and pregnancy termination rights, states should readjust their "views and emphases in the light of the advanced knowledge and techniques of the day." Doe v. Bolton, 410 U.S. 179, 190-191 (1973).

Missouri has failed to demonstrate that pregnancy termination complications are not as safely treated by a licensed physician in a non-hospital medical facility as in a hospital. Serious complications during and after a pregnancy termination are rare and can occur in any setting, including a hospital. Mahoning Women's Center v. Hunter, 444 F.Supp. 12, 15 fn 7 (N.D. Ohio 1977). Missouri has

not met its burden of showing that a licensed physician exercises poor judgment by treating those rare complications in a licensed clinic rather than in a hospital. Moreover, many doctors believe there is an increased risk of complications when pregnancy terminations are performed in hospitals instead of in out-patient clinics. Because of exposure to a larger patient population, some of whom are suffering from communicable diseases, there is an inherently greater risk of infection in a hospital than in a smaller clinic.

No similar prohibitions are imposed on licensed physicians for attending home births, at which the risk to maternal health is as great as or greater than that borne by a woman undergoing an pregnancy termination at a well-equipped,

licensed medical clinic. Similarly, there is no proscription against the performance of amniocentesis by licensed physicians in clinics. If the risk to maternal health were in fact the real basis for the mandatory hospitalization requirement, the same requirement would logically be extended to childbirth and amniocentesis.

In reality, Missouri cannot show that its hospital requirement is substantially related to the protection of maternal health.

Ironically, the mandatory hospitalization requirement, which many women cannot afford, may in fact be forcing women to return to back-alley, non-physician pregnancy terminations.

Missouri has further failed to establish that a gender-neutral scheme is a

less effective means of achieving its important governmental objective. Wengler v. Druggist Mutual Insurance Co., supra, 446 U.S. 151, and Orr v. Orr, supra, 440 U.S. 282.

Missouri has a gender-neutral mechanism for the protection of maternal health without the need for extraordinary prohibitions imposed upon doctors and patients. Missouri licenses all physicians, and regulates and licenses all medical facilities, including clinics. Aggrieved and injured patients have access to the courts of Missouri to file claims against physicians and clinics for negligence and other malpractice. All of these protections exist without reference to gender. Therefore, the state's imposition of the hospitalization requirement, as well as the requirement of the second

physician, seek to protect interests in maternal health which are already adequately protected. These extra layers of state intervention directly hamper the ability of doctors to practice medicine. See Word v. Poelker, 495 F.2d 1349, 1351 (8th Cir. 1974).

Missouri has been unable to demonstrate that it requires physicians who perform minor surgery with risks equal to those in pregnancy termination cases to operate only in hospitals. "[T]hat the state is ordinarily willing to leave such matters to the professional judgment of the attending physician strongly suggests that the program for regulating abortion clinics is a thinly disguised effort to evade Roe and Doe." Friendship Medical Center, Ltd, v. Chicago Board of Health, 505 F.2d 1141, 1153 fn. 17 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975).

Once this Court abandons the traditional notion that female patients require special legislative protection from licensed physicians who perform pregnancy terminations, there is no basis for finding a substantial relationship between the hospitalization requirement and the governmental objective. Cf. Mississippi University for Women v. Hogan, supra, at 5070 fn.11.

CONCLUSION

Under the guise of protections, legislatures have denied women access to professions, schools, and now adequate medical care. No man, even when his reproductive capacity is at stake in sterilization procedures, is subjected to nonmedical barriers to care. The state chooses not to interfere because it recognizes the necessity of speedy treatment and respects the doctor/patient relationship.

Not so with women. Here the State presumes to establish nonmedical conditions as preconditions for treatment. These conditions are unrelated to treatment. Each day that a woman must delay a pregnancy termination because of parental notification, hospitalization, or any

other legislative order, the risks to her life and health increase. Hence, even if a state has a vested interest in maternal health in the second trimester, this interest is not served by delaying and complicating pregnancy teminations. Denying access to medical care to women but not to men through impermissible nonmedical barriers constitutes a denial of equal protection.

Respectfully submitted,

JUDITH A. HARPER
Women Lawyers of Sacramento
P.O. Box 161523
Sacramento, CA 95816

TAMARA DAHN
Placer County Women Lawyers

c/o Legal Services of
Northern California
199 Hoffman Avenue
Auburn, CA 95603

NANCI CLINCH
102 Colfax East
Grass Velley, CA 95945

MARGARET M. HALLORAN
Women Lawyers of Sacramento
1365 Oak Nob Way
Sacramento, CA 95833

ESTELLE SCHLEICHER
Women Lawyers of Sacramento
1005 Eighth Street, Ste 406
Sacramento, CA 95814

Office - Supreme Court, U.S.
FILED
JUL 29 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-746 and 81-1623

In The Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON, PETITIONER

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

JOHN ASHCROFT, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF CONTENTS

	Page
Interest of the United States	1
Summary of argument	2
Argument:	
I. State regulations infringe upon a woman's right to privacy only if they unduly burden the abortion choice	4
II. In applying the "unduly burdensome" standard of review, federal courts should accord significant weight to the judgment of the state legislature	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Abrams v. *United States*, 250 U.S. 616	13
Baldwin v. *Missouri*, 281 U.S. 586	19
Ball v. *James*, 451 U.S. 355	13
Bates v. *City of Little Rock*, 361 U.S. 516	8
Beal v. *Doe*, 432 U.S. 438	7, 18
Bellotti v. *Baird*, 428 U.S. 132	5–6, 18
Bellotti v. *Baird*, 443 U.S. 622	7, 9, 18
Carey v. *Population Services International*, 431 U.S. 678	8
Colautti v. *Franklin*, 439 U.S. 379	18
Fullilove v. *Klutznick*, 448 U.S. 448	10
Gibson v. *Florida Legislative Investigation Committee*, 372 U.S. 539	8
Griswold v. *Connecticut*, 481 U.S. 479	8
H.L. v. *Matheson*, 450 U.S. 398	6, 9, 11, 18
Harris v. *McRae*, 448 U.S. 297	2, 7, 18
Kramer v. *Union Free School District*, 395 U.S. 621	17
Lochner v. *New York*, 198 U.S. 45	11
Maher v. *Roe*, 432 U.S. 464	2, 3, 7, 8, 18
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137	10–11, 16

Page

Cases—Continued:

Missouri K. & T. Ry. v. *May*, 194 U.S. 267 3

New State Ice Co. v. *Liebmann*, 285 U.S. 262 14

Pierce v. *Society of Sisters*, 268 U.S. 510 8

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 ..... 2, 5, 6, 9, 11, 18, 19

Plyler v. *Doe*, No. 80–1538 (June 15, 1982) 15

Roe v. *Wade*, 410 U.S. 113 ..... 2, 3, 4, 5, 6, 7, 13, 17

Rostker v. *Goldberg*, 453 U.S. 57 9

San Antonio School District v. *Rodriguez*, 411 U.S. 1 14

United States v. *Richardson*, 418 U.S. 166 ..... 12, 19

Valley Forge Christian College v. *Americans United for Separation of Church and State*, No. 80–327 (Jan. 12, 1982) 16

West Coast Hotel Co. v. *Parish*, 300 U.S. 379 11

Whalen v. *Roe*, 429 U.S. 589 ..... 3, 14, 16

Williamson v. *Lee Optical*, 348 U.S. 483 17

Constitution and statutes:

United States Constitution, Fourteenth Amendment (Due Process Clause)..... 4

Act of Nov. 20, 1979, Pub. L. No. 96–123, Section 109, 93 Stat. 926 1–2

42 U.S.C. 300a–6 1

Miscellaneous:

A. Bickel, *The Least Dangerous Branch* (1962) ... 16

H. Black, *A Constitutional Faith* (1968)..... 17

Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920 (1973)..... 12, 19

M. Farrand, *The Records of the Federal Convention of 1787* (1911):

vol. 1..... 13

vol. 2..... 13

Page

Miscellaneous—Continued

Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L.L. Rev. 233 (1977) 7

L. Hand, *The Bill of Rights* (1958) 13

Hazard, *The Supreme Court as a Legislature*, 64 Cornell L. Rev. 1 (1978) 16

J.B. Thayer, *John Marshall* (1901) 15

Wood & Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U.L. Rev. 783 7

In The Supreme Court of the United States

OCTOBER TERM, 1982

No. 81–746

CITY OF AKRON, PETITIONER

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

No. 81–1623

JOHN ASHCROFT, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

These cases present the question whether two legislative bodies, in the course of resolving the competing interests at stake in the abortion decision, have unduly intruded upon a woman's right of privacy. While the United States has no particularized interest in addressing the merits of the actual legislative choices made by the State of Missouri and the City of Akron, it does have a substantial interest in preserving the proper sphere of legislative action. Congress has in the past enacted legislation impacting upon the abortion decision (see 42 U.S.C. 300a–6; Act of Nov. 20, 1979, Pub. L.

No. 96–123, Section 109, 93 Stat. 926), and may again do so in the future. The United States, therefore, has a significant interest in the outcome of the cases before the Court, because they will directly impact upon the ability of this country's elected representatives—both state and federal—to deal with an important issue of continuing public debate.

SUMMARY OF ARGUMENT

The Constitution does not forbid all state regulation of the abortion decision, either during the first trimester or thereafter. "[T]he right of personal privacy includes the abortion decision, but * * * this right is not unqualified and must be considered against important state interests in regulation." *Roe* v. *Wade*, 410 U.S. 113, 154 (1973). The court of appeals in *Akron Center for Reproductive Health, Inc.* v. *City of Akron* erred in concluding that any regulation having a "legally significant impact or consequence on a first trimester abortion decision * * * is invalid" (81–746 Pet. App. 10a). As this Court has made exceedingly clear, "*Roe* did not declare an unqualified 'constitutional right to an abortion[.]' * * * Rather, the right protects the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe*, 432 U.S. 464, 473–474 (1977) (emphasis added). See also 81–746 Pet. App. 25a–36a (Kennedy, J., dissenting). Abortion regulations invalidated by this Court have been found objectionable not merely because they constitute state regulation within a protected zone of privacy, but because they constitute "unduly burdensome interference" with the abortion choice. See, *e.g.*, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 66–67, 81 (1976). Therefore, in furtherance of its important interest in protecting maternal health and potential life, a state may legitimately enact regulations relating to abortion so long as those regulations do not unduly burden the

woman's right under this Court's holding in *Roe* v. *Wade*, *supra*, to choose abortion rather than childbirth.

In applying the "unduly burdensome" standard of review to state regulation of the abortion decision, this Court should be especially sensitive to accord adequate weight to the legislative judgments involved. This Court aptly noted in *Roe* v. *Wade*, *supra*, that the "abortion controversy" has engendered "vigorous opposing views, even among physicians." 410 U.S. at 116. The abortion debate, involving questions of philosophy, medicine, religion, and oftentimes competing notions of morality, continues unabated. During the past ten years, that debate, which has resulted in numerous state enactments designed to accommodate the competing interests of those affected by the abortion decision, has centered principally in this Court. While the Court has an obligation to protect substantive constitutional rights from undue interference by the state, the Court "should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" *Maher* v. *Roe*, *supra*, 432 U.S. at 479–480 (quoting *Missouri K. & T. Ry.* v. *May*, 194 U.S. 267, 270 (1904) (Holmes, J.)).

Whether or not a particular legislative enactment unduly burdens the abortion choice depends upon the resolution of competing public policy issues upon which reasonable people readily disagree. Because the legislature has superior fact-finding capabilities, is directly responsible to the public for its resolution of the policy issues it treats, and has greater flexibility than the courts to fine-tune and redirect its efforts if a particular solution is ill-founded or unwise, the courts should test the constitutionality of legislation impacting upon the abortion choice by an appropriately deferential standard. "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Whalen* v. *Roe*, 429 U.S. 589, 597 (1977).

ARGUMENT

I. STATE REGULATIONS INFRINGE UPON A WOMAN'S RIGHT TO PRIVACY ONLY IF THEY UNDULY BURDEN THE ABORTION CHOICE

In *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, the majority of the court of appeals concluded that all state regulation of the abortion decision is subject to a "two-step analysis" (81–746 Pet. App. 9a). First, a court will inquire whether a regulatory provision has a "'legally significant impact or consequence' on the right of a pregnant woman, in consultation with a physician, to choose to terminate her pregnancy" (*ibid.*). If a regulation has no such impact, "it does not raise a constitutional issue" (*ibid.*). If, however, the regulation does have such an impact, a court must take the second step and determine "whether or not the regulatory provision serves a legitimate and compelling state interest" (*ibid.*). Even a compelling state interest, however, is insufficient to save a regulation if "it imposes an 'undue burden' on the abortion decision" (*ibid.*). In the context of first trimester abortions, this analysis is fatal to virtually all state regulation. "Since the state has no compelling interest during the first trimester of pregnancy," any regulation resulting in "a legally significant impact or consequence on a first trimester abortion decision * * * is invalid" (*id.* at 10a). In our view, the court of appeals overstated the nature of the right of privacy protected by this Court's prior abortion cases and underestimated the state's legitimate ability to accommodate the competing interests of those affected by the abortion decision.

In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), the Court concluded that the "right of privacy" emanating from the Fourteenth Amendment's Due Process Clause "is broad enough to encompass a woman's decision whether

or not to terminate her pregnancy."[1] But while the Court recognized this privacy interest, it rejected the contention that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses" (*ibid.*). The privacy right involved in the abortion decision, the Court concluded, "cannot be said to be absolute" (*id.* at 154).

Notwithstanding the above, some language in *Roe* v. *Wade* suggests that, at least during the first trimester, a woman's decision in consultation with her physician to terminate her pregnancy is beyond the reach of any state regulation. See 410 U.S. at 163. The Court, however, has never applied *Roe* v. *Wade* in such a sweeping manner. See, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("Plainly, the Court today rejects any claim that the Constitution requires abortions on demand"). Indeed, in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 66–67, 80–81 (1976), the Court upheld informed consent and recordkeeping requirements that undoubtedly impacted significantly upon first trimester abortion decisions.[2] In

---

[1] The cases now before the Court do not directly raise the question whether *Roe* v. *Wade*, *supra*, was correctly decided. The government, therefore, does not address that issue. The government's position in these cases, however, does not indicate agreement with *Roe* v. *Wade*.

[2] For example, the consent provision in *Danforth* required a woman to "certify in writing her consent to the procedure and *'that her consent is informed* and freely given and is not the result of coercion'" (428 U.S. at 65) (emphasis added). Despite the seemingly absolute language in *Roe* v. *Wade*, *supra*, the Court did not hold that this requirement for informed, written consent to first trimester abortions unduly intruded upon a woman's right of privacy. "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences" (428 U.S. at 67). *Danforth*, in short, noted the strength of the state interest furthered by the informed consent regulation, weighed it against its intrusion upon a woman's unfettered dis-

Bellotti v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*), handed down the same day as *Danforth*, the Court explained that such state regulation of first trimester abortions "is not unconstitutional unless it unduly burdens the right to seek an abortion." Thus, the primary inquiry is not, as the court of appeals in *Akron Center* suggested, whether a particular regulation has a "significant impact" upon the abortion decision (as informed consent and recordkeeping requirements undoubtedly have), but rather whether or not a regulation "unduly burdens" the abortion choice. In making this determination, the Court must balance the state interests furthered by the regulation against the woman's privacy interest. As noted in *Roe* v. *Wade* itself, "the right of personal privacy includes the abortion decision, but * * * this right is not unqualified and must be considered against important state interests in regulation" (410 U.S. at 154).[3]

This Court has repeatedly adopted an "unduly burdensome" analysis in the context of reviewing legislative enactments impacting upon the abortion decision.

---

cretion, and concluded that it did not unduly burden the abortion decision. See *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*).

[3] The Court has recognized that the state has at least two "important and legitimate" interests at stake in every abortion decision: the interest "in preserving and protecting the health of the pregnant woman," and the interest "in protecting the potentiality of human life" (410 U.S. at 162). The variables involved in the abortion decision, however, are plainly not limited to maternal health and protection of potential life. Beyond these two well-established concerns, the state has a legitimate interest in safeguarding the rights of other parties affected by the abortion decision, such as the familial prerogatives of the parents of minor girls (*H.L.* v. *Matheson*, 450 U.S. 398, 407–410 (1981); *Bellotti* v. *Baird*, 443 U.S. 622, 633–639 (1979) (*Bellotti II*) (opinion of Powell, J.)), and the "deep and proper concern" of a father for his child (*Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 69, 71–72).

Harris v. *McRae*, 448 U.S. 297, 314 (1980); *Maher* v. *Roe*, 432 U.S. 464, 473–474 (1977); *Beal* v. *Doe*, 432 U.S. 438, 446 (1977). As the Court stated in *Maher*, "the right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 432 U.S. at 473–474. See also *Bellotti* v. *Baird*, 443 U.S. 622, 640 (1979) (*Bellotti* II) (opinion of Powell, J.) (the question before the Court is whether a Massachusetts statute "provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion"). Abortion regulations invalidated by the Court have never been found objectionable merely because they impact upon some unusually discrete zone of privacy, but rather because they result in an unduly burdensome interference with the abortion choice. See, *e.g.*, *Harris* v. *McRae*, *supra*, 448 U.S. at 328 (White, J., concurring) (*Roe* v. *Wade* operates to free a woman from "unreasonable official interference with private choice"). One simply cannot view "the zone of privacy as a legal island of personal autonomy in the midst of a sea of public regulation and interaction," because the metaphor fails at a most critical juncture—it does not illuminate what constitutes an impermissible "coming ashore." Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233, 271 (1977). See also Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. Rev. 783, 803–804. The "unduly bur-

densome" standard of review provides this vital benchmark.[4]

Selection of the proper standard is vital to appropriate review of state regulations impacting upon the abortion decision. Selecting a standard of review, however, is only the beginning. It is the application of that standard that necessarily and unavoidably raises delicate issues of serious constitutional concern.

II. In Applying the "Unduly Burdensome" Standard of Review, Federal Courts Should Accord Significant Weight to the Judgment of the State Legislature

A. Abortion is an issue that has been and will continue to be the focus of great national debate. The subissues in the debate are numerous and complex, including such questions as the relative safety of medical procedures, how much information a woman should have before she makes an abortion decision, and the ex-

[4] The "unduly burdensome" standard of review, moreover, is consistent with the approach the Court has taken in other cases involving "fundamental rights." In *Carey* v. *Population Services International*, 431 U.S. 678 (1977), for example, the Court invalidated a New York statute regulating the sale and distribution of nonprescription contraceptives. The Court concluded that the statute in question, which proscribed the sale or distribution of contraceptives by other than registered pharmacists and prohibited their distribution to minors, imposed "a *significant burden* on the right of the individuals to use contraceptives" (431 U.S. at 689; emphasis added). See also *id.* at 688; *id.* at 705 (Powell, J., concurring). This language is consistent with the analysis in *Maher* and other cases discussed above. The "question of invasion of privacy is inescapably a question of degree—a question of 'unduly burdensome interference.'" Wood & Durham, *supra*, 1978 B.Y.U. L. Rev. at 805 n.104. Other "fundamental rights" cases are in accord. See, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965) ("maximum destructive impact"); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) ("infringe substantially"); *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment"); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–535 (1925) ("unreasonably interferes").

~~have before she makes an abortion decision, and the ex-~~ tent to which a spouse or the parents of a minor or immature pregnant child should be entitled to notice or consent. See, *e.g.*, *H.L.* v. *Matheson*, *supra*, 450 U.S. at 407–410; *Bellotti* v. *Baird*, *supra*, 443 U.S. at 633–639; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 67–79.

Competing views on these and related issues are deeply held by large numbers of American citizens. Pro-life and pro-choice advocates, for example, are not likely to agree on the amount of involvement to which the parents of a minor child should be entitled with regard to that child's decision to have an abortion. Since the two sides will never agree, some governmental entity must make a choice between the two competing positions. In our democratic society the governmental body with the primary authority and responsibility to resolve competing policy views and pressures among citizens is the legislature. In the abortion context, as in many others, legislation consists of selecting one set of competing private interests over another.

In the cases currently before the Court, as well as in the case of many other abortion statutes in this country, the legislatures have done their job. Some legislatures settle upon one solution or combination of solutions, while in other states the process yields different results. But in each instance the representatives of the people—who must answer to the people for what they do—have considered the people's competing viewpoints and have made the difficult choices required by the legislative process.[5] From state to state, and from issue to issue, some have won and some have lost. Pro-choice advocates have persuaded some legislatures on parental

[5] To the extent constitutional values were implicated, those values were taken into account because legislators, like other public servants, take an oath to uphold the Constitution. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).

notification issues but not on hospitalization; pro-life proponents have won the informed consent debate in one state and lost it in another.

These cases call for a determination of the standard that will govern abortion issues not yet resolved by the Court. For reasons stated in Part I, under this Court's precedents the "compelling state interest" test does not apply automatically to all regulations bearing on the abortion decision. Rather, that test applies only to state regulations that unduly burden the abortion decision. Whether or not a particular regulation "unduly burdens" the abortion decision, however, is far from self-evident. In light of the breadth and the ambiguity of the "unduly burdensome" standard—and in the interest of preserving the difference between what courts do and what legislatures do—this Court should clarify that in applying that standard on a case-to-case basis courts should be mindful that (1) at their root, the issues to which the "unduly burdensome" test is applied are policy issues, and different segments of our society have strong competing views concerning them; (2) the legislature has already considered the competing arguments, made the necessary factual inquiries, and reached a decision; and (3) the net effect of holding the legislative product unconstitutional is that those who succeeded in persuading the legislature of the soundness of their policy viewpoint are deprived of their legislative victory, whereas the legislative losers become the winners. These realities counsel that, in deciding which legislative policy choices are "unduly burdensome" and which are not, the Court should accord heavy deference to the legislative judgment. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980).

B. The ultimate determination of constitutionality rests, of course, with the courts, and judicial review is as basic to judicial authority as policy choices are to legislative authority. *Marbury* v. *Madison*, 5 U.S. (1

Cranch) 137 (1803). Each is equally important to separation of powers. The dividing line between constitutional interpretation and choosing among competing policy alternatives, however, is not always fine or bright. Compare *Lochner* v. *New York*, 198 U.S. 45 (1905), with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). The issues in this case are illustrative. On the one hand, parental entitlement to notification of or participation in an immature daughter's decision that could profoundly affect her life presents competing considerations whose resolution lie at the very core of what legislators are elected to do. See *H.L.* v. *Matheson*, *supra*, 450 U.S. at 408–410. On the other hand, courts may conclude that the legislative judgment impermissibly impedes the exercise of a constitutional right. See *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 72–75. In such cases—where the resolution of competing interests may be regarded as falling within the domain of either the legislature or the courts— which branch is entitled to deference from the other? Alternatively stated, which branch should be primary in those areas that might belong to either by application of traditional assumptions concerning the allocation of governmental authority? The legislature makes law when it chooses between competing policy alternatives. The court makes law when it declares constitutional principles. Which should enjoy residual lawmaking authority? In cases of overlap between the two, should the tilt be toward the legislature who makes law by selecting among policy choices, or toward the judge who makes law by interpreting the Constitution?[6]

[6] The issue is one that rests at the very foundation of a system of government grounded in separation of powers. It cannot be disposed of by facile generalizations such as, "legislatures cannot repeal a constitutional right" or "courts should not sit as super legislatures." The reality is that some issues fall within the purview of both legislative primacy because they involve policy choice and also judicial authority to decide constitutional-

The answer, we submit, rests on consideration of three basic differences between the legislative and judicial branches and the way those branches function. First, the legislator has superior fact-finding capability. He or she is not limited either by the case or controversy requirement, or by the decision of legal counsel in a particular case to construct the record in a particular way. The legislator is not only free to inquire into any relevant facts, but can carry that inquiry wherever the general public interest, rather than the interests of private litigants, might indicate. The second difference is that legislators must periodically account to the people for the way they have carried out their public responsibilities. By definition, issues that fall within the area of possible overlap between legislative and judicial authority involve public policy choices. They are issues that affect people. They are issues on which peoples' views may differ mightily. Vesting this residual lawmaking authority in the legislature rather than the judiciary renders the government accountable for the exercise of that authority.[7]

---

ity. The issue is not one of preclusion, because neither branch should be able completely to foreclose the other in an area of overlapping authority. Rather, the issue is one of deference. Which branch should have a presumed preference in lawmaking authority in those areas that might properly belong to either? See, *e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920, 935 n.89 (1973) ("precisely because the claims involved [in the abortion dispute] are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them—certainly not under the guise of enforcing the Constitution").

[7] As Justice Powell warned in his concurring opinion in *United States* v. *Richardson*, 418 U.S. 166, 188 (1974), vesting the courts with broad authority to second-guess legislative judgments is inherently anti-democratic:

> We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.

Third, regardless of which governmental body is vested with residual lawmaking authority, the quality of the lawmaking product is enhanced by leaving the issues exposed for a time to the legislative process and the public pressures that are brought to bear on that process.[8] See, *e.g.*, *Ball* v. *James*, 451 U.S. 355, 373 (1981) (Powell, J., concurring). One of the fundamental postulates undergirding a free and open democratic society is that the search for truth is enhanced by permitting a full and uninhibited discussion of public issues. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Necessarily, such a discussion is more effective if the ultimate resolution of the issue has not been removed from the realm of public debate and resolution through constitutional determination. The issues in this case, as well as other abortion disputes not yet resolved by the Court, are subject to differing views that are widely and fervently held. See, *e.g.*, *Roe* v. *Wade*, *supra*, 410 U.S. at 116 (noting "vigorous opposing views, even among physicians"). The

[8] The Founding Fathers emphatically rejected the suggestion that the federal judiciary serve as a "Council of Revision" to pass upon the wisdom of "every act of the National Legislature before it shall operate * * *." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 21 (1911). Nathaniel Gorham of Massachusetts argued that he "did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." 2 M. Farrand, *supra*, at 73. It was also argued to be "necessary that the Supreme Judiciary should have the confidence of the people" and this confidence would "soon be lost, if [judges] are employed in the task of remonstrating agst. popular measures of the Legislature." *Id.* at 76–77. Elbridge Gerry of Massachusetts asserted that "[h]e relied for his part on the Representatives of the people as the guardians of their Rights and interests." *Id.* at 75. This sentiment was echoed almost a century and three-quarters later by Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, *The Bill of Rights* 70 (1958).

best way to determine who is right and who is wrong on those issues is to permit and encourage the opposing sides to exercise their persuasive efforts on state legislators.[9] Equally beneficial to the search for the optimal solution is the likelihood that on any given issue, different legislatures will reach different results, and the ensuing practical experiences in the various states will cast further light on the underlying issues. This is the process by which a free, elected government works best.[10] To whatever extent the issues are constitu-

---

[9] There are profound divisions of opinion among physicians, religious leaders, theologians, philosophers, state and federal elected representatives, and individual citizens with respect to the issue of abortion generally as well as the subissues specifically raised in the cases presently before this Court. Differences among experts are no less profound in this area than in the area of education, in which the Court has eschewed second-guessing legislative judgments. This Court's observations in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42–43 (1973), are as applicable to legislative determinations concerning abortion as to legislative decisions concerning education:

> On even the most basic questions [in the area of education] the scholars and educational experts are divided. * * * The ultimate wisdom as to these [issues] is not likely to be divined for all time even by the scholars who now so earnestly debate [them]. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

[10] In *Walen* v. *Roe*, *supra*, 429 U.S. at 597, the Court emphasized that individual states must "have broad latitude in experimenting with possible solutions to problems of vital local concern." The Court stated that "Mr. Justice Brandeis' classic statement of the proposition merits reiteration" (*id.* at n.20) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experi-

tionalized, they are thereby removed from this refining process—the process by which lawmakers learn through experimentation and correction. Constitutionalization eliminates all but one of the competing points of view as acceptable alternatives; the issue is removed from the realm of public debate and decisionmaking.[11]

This is not to say that courts must always yield to legislatures in areas of overlap between the power of each. Rather, the point is that in those cases where the issue might be fairly characterized as involving either a choice among competing policy alternatives, or a pronouncement of constitutional principle, the presumption should favor treating the issue as one of policy choice.[12]

---

ments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

[11] Moreover, to the extent the judiciary presumes to provide solutions to inherently legislative problems, it may weaken the resolve of the legislative branch to assume political accountability for those problems. James Bradley Thayer described this consequence of the exercise of judicial review in his biography of John Marshall:

> [T]he exercise of [the judiciary's power of review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors * * *. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

J.B. Thayer, *John Marshall* 106–107 (1901). See *Plyler* v. *Doe*, No. 80–1538 (June 15, 1982), slip op. 13–14 (Burger, C.J. dissenting).

[12] In addition to the differences, discussed above, between courts and legislatures, judicial deference to the legislature is

C. The fact that this Court has declared that the abortion decision is a fundamental right does not, in itself, justify far-ranging judicial preemption of state or federal legislation impacting upon that decision. The reasons are two. First, under any circumstances, assigning comparative weights to individual interests adversely affected by governmental action is a task that does not readily lend itself to judicial resolution. See A. Bickel, *The Least Dangerous Branch* 15 (1962). It is not that some interests are not more weighty or "fundamental" than others. Of course they are. But if a governmental determination of comparative importance is to be made, who is in the better position to decide what is in first place, what is in second and third place, and how much distance there is between each category?

---

also supported by a consideration fundamental to separation of powers theory. Either branch could legitimately lay claim to primacy in the area of overlap, since the issues in this area involve policy choices as well as the meaning of the Constitution. The final arbiter, however, of which branch is to prevail is necessarily the judiciary. *Marbury* v. *Madison*, *supra*. Where one of the branches is not only a territorial claimant but also the final judge of the territorial dispute, that branch should conscientiously lean away from its own claim in otherwise close cases. See *Whalen* v. *Roe*, *supra*, 429 U.S. at 597. See also Hazard, *The Supreme Court as a Legislature*, 64 Cornell L. Rev. 1, 16–17 (1978). As the Court recognized in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, No. 80–327 (Jan. 12, 1982), slip op. 8–9, a restrained exercise of the ultimate judicial power of declaring a legislative act unconstitutional is essential to the continued effectiveness of that power:

> The exercise of the judicial power also affects relationships between the coequal arms of the national government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive branch. While the exercise of that "ultimate and supreme function," *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. [339,] 345 [(1892)], is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role.

The "comparative fundamentality" of any interest is a function of the interests of individual persons. Those persons, moreover, are the best judges of what interests ought to be accorded greater weight by government, regardless of the theory by which the weights are assigned or the labels attached. Those persons are also the people who elect legislators. Therefore, the fine-tuning that is necessarily involved in determining which interests should be more or less weighty and what the differences should be is appropriately left to the elected branches.[13] See H. Black, *A Constitutional Faith* 11 (1968).

Second, whatever the problems generally attendant upon judicial determination of fundamental rights, the extension of that approach to these cases is particularly inappropriate. Ten years ago this Court declared a three-part set of rules prescribing what is permissible and what is impermissible, depending on the stage of pregnancy at which the abortion occurs. Many questions were left unanswered, and over the intervening decade, adversaries have periodically returned to ask

---

[13] Consider, for example, the individual interests in two leading cases at opposite ends of the spectrum of this Court's deference to state legislative judgment, *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), and *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955). *Kramer* held that New York may not constitutionally limit the right to vote in school board elections to parents of school-age children or owners or renters of real property. The reason: the right to vote is fundamental. *Williamson*, by contrast, held that Oklahoma has very broad discretion to determine who may engage in the business of fitting eyeglass lenses into frames. Assume that New York adopted the same regulatory statute involved in *Williamson*, and assume further that Morris Kramer was an optician rather than a stockbroker. Which would he say was more "fundamental" to him—the right to practice his business or the right to vote for school board members so long as he had no school-age children and bore none of the schools' financial burdens?

the Court to fill in more detail, resulting in a set of rules that has become increasingly intricate and substantially more complicated. See, *e.g.*, *H.L.* v. *Matheson*, *supra*; *Harris* v. *McRae*, *supra*; *Bellotti* v. *Baird* (*Bellotti II*), *supra*; *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Maher* v. *Roe*, *supra*; *Beal* v. *Doe*, *supra*; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*; *Bellotti* v. *Baird* (*Bellotti I*), *supra*.

In the instant cases, the competing sides in the abortion controversy are back again. Unless the Court clarifies that in applying the "undue burden" test to all future issues substantial deference is to be accorded the legislative judgment, these cases will result in more detail and more complexity, taking the Court further away from what courts do best and more into the realm of what legislatures do best.[14] Even more important,

---

[14] In recent years, this Court has been called upon to engage in increasingly difficult line-drawing involving such questions as parental and spousal consent or notification (*Bellotti* v. *Baird*, *supra*, 428 U.S. at 145; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 67–75; *Bellotti* v. *Baird*, *supra*, 443 U.S. at 639–651, 652–656; *H.L.* v. *Matheson*, *supra*, 450 U.S. at 407–413), the relative merits and demerits of such discrete medical techniques as saline amniocentesis (*Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 75–79), the determination of viability (*Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 64; *Colautti* v. *Franklin*, *supra*, 439 U.S. at 390–394), and public funding of the abortion decision (*Beal* v. *Doe*, *supra*; 432 U.S. at *Maher* v. *Roe*, *supra*; *Harris* v. *McRae*, *supra*). These and similar issues are well-suited to legislative resolution. For example, the two cases currently before the Court raise the issue whether a state may legitimately require that all second trimester abortions take place in a hospital rather than an abortion clinic. The court of appeals in No. 81–1623 rather candidly admitted that in resolving this question "it is clear that the central issue is the relative safety of nonhospitalized * * * and hospitalized [abortion techniques]" (81–1623 Pet. App. A–64). This and other remaining abortion issues (such as informed consent requirements, physician-patient counseling, and the age at which daughters may proceed without their parents being notified) are

over the ensuing decades, the adversaries will be back again and again. Each time, the set of rules will inevitably become longer and more detailed. See, *e.g.*, *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 92 (White, J., dissenting) ("[t]he task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process"). Very simply, that is an unfair and improper burden to impose upon any Constitution. It is especially unfair to impose it on a Constitution that contains no mention of the words "privacy" or "abortion" and that can be extended to those matters only by piecing together a combination of shadows from a variety of explicit guarantees contained in the document.[15] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, *supra*, 82 Yale L.J. at 937–949.

---

the kinds of issues best resolved by legislatures, with their superior fact-finding capabilities and their ability to redirect and fine-tune their efforts in light of evolving medical knowledge and other changed circumstances. As Justice Powell noted in his concurring opinion in *United States* v. *Richardson*, 418 U.S. 166, 188 (1974):

> repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negate the actions of the other branches.

[15] *Baldwin* v. *Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting):

> [W]e ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.

The time has come to call a halt to that process. The Court should declare that the governing standard is whether the state regulation at issue unduly burdens the abortion decision, and that in deciding on a case to case basis whether the burden is permissible or impermissible, courts should give heavy deference to the state legislative judgment. In the cases before the Court, the effect of that holding will be to vacate the judgments of the court of appeals to the extent they fail to uphold the constitutionality of what the Missouri legislature and the Akron City Council have done, and to remand the cases for further consideration under a more deferential standard. In the future, the effect will be to channel further refinements of abortion law largely into the stream of state legislative authority.

CONCLUSION

The portions of the court of appeals' judgments that invalidate segments of petitioners' abortion regulations should be vacated and the cases remanded for reconsideration in light of the standard proposed in this brief.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
RICHARD G. WILKINS
Assistant to the Solicitor General

JULY 1982

END OF DOCKET